

15-29
Modern Reports :

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C A S E S

ADJUDGED IN THE

Court of King's Bench,

FROM THE

Second Year of KING WILLIAM III. to
the End of his Reign.

With TWO TABLES: One, of the NAMES of the CASES;
the Other, of the PRINCIPAL MATTERS.

By a late BARRISTER of the Middle-Temple.

V O L. XII.

The SECOND EDITION.

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THE PREFACE.

AS these Reports were taken during the Time Lord Chief Justice Holt presided in the Court of King's Bench, nothing need, nothing can be said to recommend them to the Publick, but that they are a faithful Collection of the Decisions of difficult and important Questions of Law, in which that great Man bore so great a Part.

Many of the Cases are reported; many of them have been kept lock'd up in the private Studies of Gentlemen of the Profession, possibly with a View to their own particular Benefit and Reputation. Those which have been reported, it is imagin'd, will receive some Light from the same Cases here printed; as the whole Chain of Arguments, the Objections and Answers of the Counsel are faithfully preserved; by which the whole of the Case, and the Reason on which the Judgments were founded, will clearly appear.

As to those Cases which have not been in Print, (of which there is a very large Number) it is presumed they will be a valuable and useful Present to the Publick.

The Justice, Wisdom, and unbias'd Integrity of Lord Chief Justice Holt, those who lived in his Time were immediately sensible of; and to that Justice and unshaken Integrity, and the universal
Suf-

Suffrages of Praise of a whole Nation for such a Behaviour, we may possibly, in a great Measure, be indebted, for such a Series of great Men since his Time, in the Profession of the Law; not to be equall'd in any former Period of History, and not likely to be exceeded in any future.

He has shewn us that real Merit will make its own Way without any Assistance, without any little Arts or Assiduities; and that the only certain Method to have a good Reputation, is to deserve it. Great and Good Men, who dare do Right, without Regard to the Strength of Opposition, or the Clamours of a Multitude, are not only a Blessing to the Age in which they live, but to succeeding Generations, by their being Incentives to a Similar Behaviour to Posterity.

Of this the present Age are abundantly sensible, in having the several Courts of Judicature filled with Persons of the greatest Integrity and Abilities; and sedulously careful of the Rights and Liberties of the People; and in my Judgment, his Majesty could not possibly have given more convincing Proofs of a fixed and determined Resolution to preserve the Constitution and the Liberties of the People in-violate, than his having appointed such Persons to administer Justice, who would not, on any Consideration, either by Hopes or Fears, Rewards or Threats, be swerved from doing right.

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D E

Term. Sanct. Mich.

Anno 2 W. & M. in B.R.

Wooldridge versus Cloberry.

ACTION for diverting a Water-course from a Mill against several, who join in pleading *Non culp'*. One of them dies before Verdict. *Per Cur'*, Its Error *in toto*; for when after Joinder in Pleading one of the Defendants dies, after the *Venire facias*, you ought to come into Court and pray Judgment against the living only; otherwise the Writ shall abate.

Where two Defendants join in Pleading, and one dies after the *Venire facias*, 'tis Error *in toto*.

Copley versus Hepworth.

Covenant to pay annual Rent of 60 l. and Repair. Plaintiff says, Defendant entered, but does not aver a Lease made. Defendant pleads, he ought not to have Rent for no Lease made. *Holt*: In mutual Covenants, where the Performance of one does depend upon another, the precedent Covenant must be performed first. *Per Eyres & Dolben*: The Covenant and Entry amount to a Lease; and so was *Harrington* and *Wise's Case*. *Holt*: It has been held *aliter* ever since. Judgment *pro Quer'*.

Covenant and Entry amount to a Lease.

Cone versus Bowles.

ERROR of a Judgment in Replevin, in the Common Pleas. The Error assigned was, that three made Co-plevin against three Defendants, one of whom an Infant, but all appeared by Attorney; Judgment was given against the Plaintiff, who assigned this for Error; but not assignable for Error, because might have been pleaded in Abatement.

Salk. 205. 4 Mod. 7. Cumb. 100. 1 Sho. 165. Casb. 122, 179.

nufance by Attorney, and one of the Avowants was an Infant. *Eyres* for affirming Judgment, This may be assigned for Error, tho' pleadable in Abatement. 2 *Cro.* 5. Where the Writ is abatable generally, and the Defendant pleads in Bar, and Judgment against him, it is not assignable for Error. 1 *Roll's* 181. 3 *Cro.* 378. 1 *Roll.* 288. 2 *Saund.* 212. Avowry is in Nature of a Count. 1 *Inst.* 303. Avowry abatable as other Declarations is; and here Avowants are Plaintiffs; and tho' an Infant cannot count by Attorney, for he cannot make a Warrant of Attorney; yet as Plaintiffs, and some of them of full Age, they may sue by Attorney; and the Plaintiff of full Age may make Warrant of Attorney for all. *Gregory concess'*, & *Dolbin, per quem*, Not Error, because *in auter Droit*; and admitting it had been Error at Common Law, the Stat. of 21 *Jac.* would have help'd this Case; for notwithstanding that speaks of a Verdict, and ours is a Nonfuit, yet it is within the Intent of it. *Holt*: This is not assignable for Error; tho' an Infant acts *in auter Droit*, yet Damages shall be recover'd *de bonis propriis*, if Judgment be against him; and there is the same Reason, why he should have a Guardian where the Action is *in auter Droit* in this Case, as in other Cases, where Infant is Executor, and Recovery is had against him. *Vide 5 Co. Russell's Case.* A Release by Infant Executor is void. 2 *Cro.* 441. And being joined with others alters not the Case; for no Reason, if all the rest are Beggars, they should conclude the Infant. It differs from the Case of Executors, for they must all join in Defence, being joined in the Will; and the Infant Executor may disavow at full Age, and not be concluded by Recovery under Age. But the Reason why it is not pleadable for Error is, because it is pleadable in Abatement; and where the Time is lapsed, there shall be no Advantage in Error. *Vide 9 Co. Case de Avowries.* And 2 *Cro.* 5. is no Law; for at that Time the Court of Exchequer Chamber were grasping at Errors in Fact, and that was the Reason of that Resolution; but no Error in Fact is assignable there, but in this Court only. 1 *Roll.* 783. no Law. *Jud' affirm'.*

Dominus Rex versus Lambert.

Return to a
Mandamus,
*non fuit debite
electus*, good.

Mandamus was awarded for Restitution of Dr. L. to the Office of Archdeacon of *Salisbury*; and return, *quod non fuit debite electus*; and argued to be bad, because a
I
Negative

Negative pregnant, but it ought to be, *non fuit electus ut dicitur*. 1 Sid. 209, 210. But *per Cur'*, Good; for the Writ recites, *licet fuit debite electus*, and the Return is a direct Answer; and so held at the End of the Case reported by *Siderfin*.

Kemp versus Andrews.

IN Trover declares, that N. J. S. and himself were posses'd, that the others died, and the Goods came to the Defendant's Hands, &c. Defendant pleads, that they were Joint Merchants, and no Survivor by Law amongst them; and so prays the Plaintiff, as to the Joint Goods, may be barred. Demurrer, and Judgment *pro Quer'*. For tho' no Survivor, 1 Inst. 182. a. yet the Plaintiff had Right to a Part; and Jointenancy ought to be pleaded in Abatement, and not in Bar.

Jointenancy to be pleaded in Abatement, and not in Bar. Vide Lev. Ent. 19. 3 Lev. 191. Vide 1 Saund. 291. 1 Vent. 34.

Elliot and Danby.

A Ssignment of a Term by Commissioners of Bankruptcy was made to a Creditor, who before Inrollment of the Deed of Assignment, made a Lease to the Defendant, and then the Deed was inrolled. *Per Cur'*: Such a Lessee cannot maintain an Ejectment, because the Lease could not have been before the Inrollment; the Words of the Statute are, *That Commissioners may sell by Deed inrolled*; so without Inrollment no Sale. *Vide tamen 2 Co. 26. a.*

Sale by Commissioners of Bankruptcy must be by Deed inrolled. Vide Sir Tho. Jones 196, 197.

Note; *Per Cur'*, Action lies against a common Carrier, for refusing to carry Money, if he does not assign a particular Reason for it.

Hook versus Galloway.

TRover *de decem ponderibus*, Angl' Weights. *Per Cur'*: Trover *de decem ponderibus*, Angl' Weights, enough, for Damages only are to be recovered therein; *secus* in Detinue, where the Thing it self is to be recover'd.

Trover *de decem ponderibus*, Angl' Weights, good; *aliter* in Detinue.

D E

Term. Paschæ,

Anno 3 W. & M. 1691.

Le Roy versus Gilbert.

Leets by Prescription may be held at different Times, and need not shew by what Authority.
1 Salk. 200.

IN many Places, by Prescription, Leets are held at other Times than within a Month after *Easter* or *Michaelmas*. In all Leets they only say, *ad Cur', &c. teni'* such a Day, without shewing their Authority; it had been a good Objection not to shew Authority, if constant Practice had not been *aliter*.

Crofts versus Harris.

Award without Performance, good Bar.
Carth. 187.

AN Award without Performance is a good Bar, but not an Accord without Satisfaction. At this Day the Submission of both Parties is a mutual Promise, whereupon an *Indebitatus Assumpsit* lies.

Temple versus Killingworth.

Case lies for suing in a Court which has no Jurisdiction.
Vide Hob. 267.
Carth. 189.
1 Show. 254.

PER *Holt*: Of late it is held, that Case will lie for Prosecution in an Inferior Court, where Court has not the Jurisdiction. The first Case in Point was at *Huntingdon* Assizes, and referred to the Common Pleas, and there adjudged, that to sue a Man, without any Cause of Action at all, no Action lies, unless it appears to be with a malicious and vexatious Design.

If Declaration be Part well, and Part ill, it shall be good for that which is well declared of: But if Writ of Enquiry be executed for the whole, or if intire Damages be given, it is good Cause to stay Judgment. *1 Vent. 27.*

If on Declaration in Part bad, entire Damages be given, or Writ of Enquiry be executed for the whole, 'tis ill. Hob. 189.

A Writ of Error must be of a common Return, if on a Day certain, it is naught: Where the Writ of Error is *ubicunque*, the *Scire fac'* ought to be on a common Day.

Writ of Error must be on a common Return.

Smith versus Bromely.

A Lease for a Year, Rent payable *quarteriatim*; and not said to be at the most usual Feasts or Days of Payment; and Avowry was made for Rent due at *Festum Michael*, whereas it ought to have been the 23d of September, according to Calculation. *Eyres*: If he had declared of a Rent *aretro* at *Mich'*, it would have been well, but here it is for a Rent due at *Mich'*, *Ergo* not good.

Rent due 23 Sept. declared of as due at Michaelmas, ill.

Dr. Needham's Case.

IT was moved, that an Execution on a *Sci' fac'* on the Goods of Dr. *Needham* might be avoided, because the Writ was sealed and delivered to the Sheriff after the Defendant's Death; and Stat. 29 *Ca. 2. c. 3.* provides, that no Writ of *Fi' Fac'*, &c. shall bind the Property of Goods against whom such Writ is sued forth, but from the Time that such Writ shall be delivered to the Sheriff; and so provides, that the Writ shall not bind Goods against the Party, and not as in other Cases against the Purchaser only; and so the Dr.'s Goods not bound. But *per Cur'*: This Clause is to be understood of the Goods of a Purchaser, purchased by him before Delivery of the Writ; but as to the Party, it shall bind as before from the *Teste*, as it was before the Statute.

Scire facias sealed after the Party's Death, Execution thereon good. 29 *Car. 2. c. 3.* Sid. 29.

Carth. 188.

Willett versus Tiddy.

Officer sued
for levying
Taxes, to
have treble
Costs.

I*Ndeb' Assump'* for Money received to Plaintiff's Use; Defendant justifies, as Collector of Aid of the King by Parliament given, by a Distress warranted by the Statute, and found for Defendant; and if he shall have treble Costs by that Statute given, for being sued in the Exercise of his Office, was the Question, on Motion. And it was urged, that this is not Matter concerning his Office; for it may be for Money received to his own Use, or for Overplus of Distress not returned; and whereas Action was brought by Presentment in the Ecclesiastical Court against a Constable, and found for him, it was adjudged out of the Stat. of 7 Jac. 5. for it does not directly touch his Office. 1 Cro. 285. Jones 305. So in an Action on the Case for False Presentment by a Constable, that the Plaintiff's Lands were in the Parish of S. it was adjudged that he should not have double Costs by the Stat. of 7 Jac. because the Question arises wholly on the Place where the Lands are, and not on the Duty of the Constable. 1 Cro. 467. And Holt inclined to that Opinion; for if the Action were brought for Overplus not return'd, this does not touch his Office, and he does not use the Statute for Defence: But because certified by Judge of Assize, that it was within the Statute, Defendant had treble Costs.

Edwards versus Dickenson.

Case against
Post-Master
for not deli-
vering a Let-
ter when re-
quested.

CASE against Post-Master of *Bristol*, for not delivering a Letter sent by him by Post *sur* Request; and on Demurrer held, the Action was well maintainable upon Request and Refusal, without any particular Damage accrued, for Miscarriage of a Letter is Damage; but if Defendant had tendered the Letter, and Plaintiff would not pay Postage, he is not bound to deliver the Letter; but then this ought to have been shewed on Defendant's Side. *Et Jud' pro Quer'.*

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Term. Sanct. Trin.

Anno 3 W. & M. 1691.

Godefrey versus Newton.

ERROR of a Judgment in *C. B.* in Debt against an Executor, after Lease determined, for Rent due in Testator's Time on a parol Lease; Defendant pleads an Obligation entered into to *A.* by the Testator, *ultra quod* he had not Assets, and so demands Judgment; and on Demurrer Judgment for Plaintiff in Common Pleas, and affirmed here; for *per Curiam*, Debt for Rent, upon a Lease for Years after Lease ended, favours of the Realty, and is in equal Degree with Debt upon a Bond, and therefore Bond not to be preferr'd to it: And so is *Office of Exec.* 209.

Comb. 183.
Rent due on
an expired
Lease, is of e-
qual Degree
with Debt on
Bond.
Vide postea
Pasch. 11 W. 3.
Cage and Ac-
ton.
Lev. 114,
Off. Exec. 209.

Chew versus Briggs.

A Trial was in *Middlesex* on a Traverse in *Surrey*; and this moved in Arrest of Judgment; and *Holt* of Opinion to stay Judgment, for that a wrong County is not remedied by the Statute, but only a wrong *Venue* in a right County; the Words of 16 & 17 Car. 2. c. 8. enact, *That no Judgment after Verdict shall be arrested or reversed for that there was no right Venue, so the Cause be tried by a Jury of the proper Place or County where the Action was laid*; these Words are restrictive. *Dolbin, Gregory and Eyres cont.* 263. 1 Saund. 247. *Eyres*: If it had been *res integra*, I should be of another Opinion, but all Resolutions being otherwise, I accord. *Sid.* 325. 1 Saund. 247, 248.

Trial in a
wrong Coun-
ty aided by
by 16 Car. 2.
c. 8.

1 Vent. 22,

A toutes

Semper paratus.

Postea Mich.

7 W. 3. Wig-

more and Veal.

Postea Mich.

9 W. 3. Giles v. Hart.

Postea Pasch. 12 W. 3. Horn v. Luines.

Appearance

helps a Mis-

continuance,

but not a Dis-

continuance.

A *touts temps prist* can never be pleaded after Imparlance. On a Bond after Imparlance, you may plead Tender and *uncore prist*, for no *toutes temps prist* need be pleaded in that Case.

Giles v. Hart. Postea Pasch. 12 W. 3. Horn v. Luines.

An Appearance does not help a Discontinuance, as it does a Miscontinuance; and it is a Question, whether Discontinuance in Process be help'd by the Statute of *Jeofails*, tho' Discontinuance in Pleading may be help'd. *Per Holt.*

If Award be, that a general Release to the Time of Award may be given, a Release to the Time of the Submission is a good general Release.

D E

Term. Sanct. Mich.

Anno 3 W. & M. 1691.

Anonymus.

IN an *Homine Replegiando* one must plead *Instanter*, without Imparlance, as in an Appeal.

The King and Davis.

No new Trial

on Acquital,

on Informa-

tion, for being against Evidence.

1 Lev. 124.

UPON Information for a Riot, a Trial was had, and Verdict given for the Defendant, and a new Trial *Aliter*, if by Fraud or Surprise. 1 Sho. 336. 1 Sid. 149, 153.

L

prayed

prayed for, for the K. and Sir *John Jackson's* Case alledged, the Court said that was proved to be by Fraud, and since that, in *Hale's* Time a new Trial had been granted, the Verdict being obtained by Fraud; but this Verdict being only against Evidence, but no Fraud, a new Trial was denied. New Trial granted in the Case of the *Queen v. Coke*, the Acquittal being by Surprise upon the Prosecutor, for Want of Notice, it being brought on by Defendant; it was *Mich. 3 Anna*, Indictment for keeping a common Bawdy-house.

Hill versus Mills.

THE Bankruptcy of an Executor is no Cause of granting Administration to another. Where there is a natural Disability, there is a Necessity of doing it; but it must be *ad usum & commodum* of the Executor, so the last Granting of Administration is a Nullity, and *ipso facto* void.

Justi. Inst. Lib.
1. Tit. 26.
§. 12.
1 Lev. 157.
1 Sid. 280.
1 Lev. 186.
1 Sid. 293.

370. Skin. 299. Comb. 185. Postea Mich. 10 W. 3. The King and Richard Rains.

Styrrop versus Stoakes.

IF Money be disbursed by Church-wardens for repairing the Church, or any Thing else meerly Ecclesiastical or Spiritual, the Spiritual Courts shall allow their Accounts: But if there be any Thing else, that is an Agreement between the Parishioners, the succeeding Church-wardens may have an Action of Account at Law, and Spiritual Court has not Jurisdiction.

Stockwell versus Collison.

ASSUMPSIT, on Consideration that he had assumed to serve Defendant as Commissioner to examine Witnesses in a Suit between him and B. that Defendant promised to pay him for his Pains. It was alledged, that a Commissioner could not have an *Assumpsit* on such a Promise, for he ought to be indifferent, and it is unlawful to be paid for such Service; as a Promise, in Consideration that Plaintiff would take a special Warrant and Arrest, to pay such a Sum, is void. *Noy* 78. If a Man, in Consideration of Money, undertakes to do Execution, not good. 2 *Cro.* 103. But *per Cur'*,

Commissioner
intitled to
Fees on a
*Quantum me-
ruit.*
Sal. 330.
Sho. 342.

Cur', A Commissioner is named by the Party, and it is intended he would favour him; and therefore it is a Challenge to the Favour, that he is a Commissioner at the Denomination of the Party, tho' no principal Challenge. 1 *Inst.* 157. *b.* and a Commissioner takes Pains to attend the Examination of Witnesses, and therefore deserves Recompence, as well as a Commissioner of Bankruptcy; and there is a Difference between him and a Sheriff. *Jud' pro Quer'*.

Jones versus Beau.

Office of Register of *Landaff* may be granted to two.

1 Sho. 288.

Salk. 465.

Cart. 213.

ON an Issue out of Chancery found, that Bishop of *Landaff* in *Wales*, in 1671. granted the Office of the Register, (which was several Times granted to two since Stat. of 1 *Eliz.* and no Grant to one only proved before the Statute) to Sir *R. Floyd* and the Plaintiff; and the Plaintiff claimed the Office by Force of the Grant; and it was agreed, that if such Grant to two had been good at Common Law, it would not be defeated by the Statute; for it allows a Grant to two, where the Usage had been so; and the constant Usage since is good Evidence of it's having been so before. But it was argued, that such Grant had been void at Common Law; for this is a judicial Office, which cannot be granted to two in Reversion. 11 *Co.* 4. Office of C. J. not grantable to two. But *per Cur' contra*; A judicial Office may be granted to two, as well as a ministerial one; and no Inconvenience more in one Case than in the other; the Office of a Judge may be well granted to two. If these two Chancellors differ, the Bishop may set himself, and their Authority ceases.

College of Physicians versus Basset.

ACTION for practising Physick without Licence; Declaration lay it to be at *Westminster* in *Com' Midd'*, but not that it was within seven Miles of *London*, and therefore bad.

1 Vent. 21.

2 Rol. Abr.

459. pl. 2.

3 Lev. 46.

Sheriff cannot return a Rescous upon a Writ of Execution.

Per Cur': Where there be several Executors, and only some of them appear and plead, Judgment must be against them

them all; but Execution *de bonis propriis* shall go against him that has appeared. *Item* Submission to Award by Executor is a *Devastavit*.

Germin & Ux' versus Orchard.

TRespafs for breaking Plaintiff's Close; Defendant pleads, that *J. S.* was seised of the Place where in Fee, and being so seised demised it to Plaintiff's Testator for a certain Number of Years, &c. and that Testator by Deed assigned it to Defendant. And to another Part of the Place where, &c. he pleads another Plea, to which Plaintiff demurred, having traversed the Assignment, and *Ven' fac'* awarded, *tam ad triandum exitum prædictum, quam ad inquirendum de damnis*, in Case Judgment should be for Plaintiff, upon the Demurrer. Jury found a special Verdict, 'That *B.* by Deed reciting, that whereas *J. S.* had demised such a House to him, and Land, &c. he granted and assigned to Defendant the said House and all other the Premises and Appurtenances, together with the said recited Lease, and all Writings and Evidences concerning the same, to have and to hold from and after the Death of the Assignor and his Wife, for and during the Residue of the said Term unexpired; & *si Cur'*, it is a good Assignment for Plaintiff, *secus* for Defendant; and assesses Damages, &c. but assesses no Damages on the Demurrer; for on that there was a *Nolle prosequi* enter'd.

Salk. 346.
Grant of a
Term for
Years to a
Man, *Haben-*
dum after the
Death of the
Grantor; the
Term passes
presently, and
the *Haben-*
dum is void.

Sir *Bartholomew Shower*: This is no good Assignment; the Office of Premises was to ascertain the Estate intended to pass in the *Habendum*; but tho' the Premises do make the Estate certain, yet it may be utterly defeated by the *Habendum*; and therefore here the *Habendum*, limiting the Commencement of the Lease to be from Death of Assignor and his Wife, defeats the Premises. A Lease for Years should have a certain Commencement and Ending, otherwise it is void. 1 *Inst.* 45. b. And here the Time of Assignor's Death is not known; and an *Habendum* not only alters and abridges, but sometimes wholly frustrates the Premises. A Feoffment to *A. Habendum* after Death of Feoffor, void. 3 *Cro.* 254. True it is, that if Grant be compleat in the Premises, a contradicting *Habendum* shall be rather void than defeat it. *Hob.* 171. *Dyer* 272. And if it be objected, that all the Term is granted here in the Premises, by the Words, *the said recited Lease*: It may be answered, that by the Word
(Lease)

(*Lease*) the Term is not extended, but the Deed indented only, because of the Words subsequent, *all the Writings and Evidences*.

It was argued likewise, that the Verdict was good notwithstanding the Omission of Enquiring of Damages on the Demurrer; for as to that, it is but an Inquest of Office, and may be supplied by another Writ. *Dj. 135. 11 Co. 6. a.* But if the Verdict would have been deficient, for this Cause, it is aided by a *Nolle prosequi*; for where a Verdict is insufficient, by Assessment of entire Damages, or Non-assessment of Damages and Costs, where they ought to be assess'd, it cannot be supplied by a Writ of Enquiry; but Release of Damages and Costs remedies Suits and Imperfection in the Verdict.

Contra: The Word (*Lease*) contains all his Interest in the Land, and not the Deed indented only, for if the Indenture were intended to be conveyed only, it might have been by the other Words, (*all Writings, &c.*) and then the Word (*Lease*) ought to carry the Term, otherwise it will be of no Use; but such Construction ought to be made as *accipiantur cum effectu*; and that the Word *Lease* comprehends all his Estate in the Lands, *vide Peytoe and Pemberton's Case*; where a Man pleaded he had surrendered *dimissionem præd'*, and construed a Surrender of his Interest. *1 Cro. 101.* Then all his Interest being given in the Premises, the *Habendum* being contrary is void. *1 Co. 155.* And if the Assignment be good, the Verdict is void; for if the Jury had found excessive Damages on the Demurrer, Attaint would lie against them; and in all Cases, where Attaint would lie against the Petit Jury for excessive Damages, there, if no Damages be assess'd, such an Omission shall not be supplied by a new Enquiry. *11 Co. 119. a. 2 Rol. Abr. 722, 3.*

Per Cur': This Assignment is void; for if a Man grant Lease for Years, *Habendum* after Death, it is void. *Eyres* cited a Case to the contrary, *2 Rol. Abr. 66. b.* but it was denied *per Holt*, and not minded by others; and a Diversity was taken, where one grants his Term for so many Years as shall be arrear after his Death, and a Grant of his Term for four or more Years in certain, *Habendum* after his Death; the first is void, the second good. *1 Co. 155.* And the Verdict is insufficient, and such Insufficiency not aided by a *Nolle prosequi*; and *Jud' per totam Curiam*, that Assignment not good. This Judgment reversed in the Exchequer-Chamber, and that Reversal affirmed in the Lords.

¹ Vent. 83.

King and Evans.

M*Andamus* to restore *Evans* to the Office of Clerk of the Peace: A Misbehaviour returned, *videlicet*, That a Demand being made of the Rolls he did not deliver them to the *Custos Rotulorum*; and a peremptory one moved for; for the Stat. 1 W. & M. vests a Freehold in the Clerk *quandiu se bene gesserit*, they are to remove him but on Misdemeanor in Execution of his Office, and Articles against him are to be put in Writing, which is not said to have been done. *Holt*: The Keeping of Rolls does of Right belong to the *Custos Rotulorum*; the Clerk of the Peace is a distinct Officer, and not a meer Servant; and his Business to make up the Rolls and enter them. Peremptory *Mandamus* granted.

Clerk of the Peace not removeable but for Misdemeanor.
1 Sho. 282.
4 Mod. 31.
Postea Trin. 5 W. & M. Harcourt and Fox.
Postea Trin. 10 W. 3.
Saunders and Owen.

Parker versus Winch.

HOLT: An Antient Demesne Manor is impleadable at Common Law, but the Lands holden of the Manor, are only impleadable in the Court of the Manor; and laying it in the Declaration to be Part of the Manor, shews it not impleadable in the Court of the Manor; for Land holden of the Manor cannot be said to be Part of the Manor. *Eyres*: The Rent may be Parcel of the Manor, and so may the Services, tho' the Land is Frank-fee; and whatever is holden of the Manor is not Part.

Ancient Demesne Manor impleadable at Common Law; Lands held of it pleadable at Common Law. Vide Reg. f. 4. b.

Coke versus Hawkins.

Motion for Prohibition to Spiritual Court, for a Suit for a Defamation, and it being after Sentence, denied; because they had not pleaded to Jurisdiction of the Court. *Q.*

Prohibition to the Spiritual Court, on Suit for Defamation, not granted after Sentence.

King and Inhabitants of Hornesey.

HOLT: Upon a Presentment for not Repairing a Highway, on Not guilty, you can't give any Thing in Evidence, but only that the Way is repaired. If they plead they ought not to repair, they must set forth who ought. You can't give in Evidence no Highway, but may traverse it. *Eyres cont.* *Dolbin*: They may give in Evidence, that it is no Highway, but not that they ought not to repair.

Highways.

D E

Term. Sanct. Hill.

Anno 3 W. & M. 1691.

Cudlip and Rundall.

4 Mod. 9.
Carth. 202.
Where Part of
a Thing demised
in general Words,
is well excepted
by particular Words.

CASE; Plaintiff declares, that being possess'd of a House, with the Appurtenances, the 25th of *March* 36 *Car* 2. for a Term of Years then and yet unexpired, by Indenture demised them to Defendant for seven Years next ensuing; who entered and was possess'd, *et ignem suum in domo predicta tam negligenter custod'*, that on the 8th of *Nov.* the House was burnt, *ad damnum suum* of 300 *l.* Defendant pleads *non dimisit modo & forma*, Issue is joined; and a special Verdict, That the Plaintiff was possess'd, and 25th of *March* 36 *Car.* 2. demised by Indenture to Defendant all that one Messuage, &c. together with all Houses and Out-houses to the same belonging; excepting and always reserving out of the said Demise to the Plaintiff, his Executors and Administrators, the House commonly called the new House, new built upon the Premises, for the Use only of the Father of the said Plaintiff, the said Plaintiff, their Wives and Families to live in as they please, but not to be let to any Person or Persons whatsoever; and all other Times when they shall not dwell there, to be used by the Defendant, his Executors, Administrators and Assigns, to hold the Premises, except as before excepted, to the Defendant for seven Years. That at the Time of the Lease there were two Mansion-houses on the Premises, one old one, and one new built; that the new built House was only burnt; that at the Time of the Fire, the Defendant was in Possession of the new built House, except one Room which the Plaintiff had, and that the House was burnt

burnt by Fire, negligently kept by Defendant in the Part of the House in his Possession. *Et si, &c.*

And it was agreed in this Case, that no Action on the Case lies against Tenant at Will for his Neglect in the Custody of his Fire, by which his House was burnt. 5 Co. 13. b. So the sole Question here was, if the Defendant was other than a Tenant at Will of the new House; and if the House was demised to him for seven Years; & *per Cur' seriatim*, It is not; for the Lease is made of the Messuage, &c. except the new House, so that it is excepted by express Words in the Premises, and also in the *Habendum*, which is not contrary or repugnant to the Premises; for there was another House demised, which supplies the Words (*together with all other Houses*); and where the Exception does not defeat the Grant, or is contrary to it, it must stand; as *Dyer* 264. b. *Hob.* 170. And if the Exception be good, then the Question will be, if it be not avoided by these Words, *reserving to Plaintiff his Executors, &c.* for an Exception out of an Exception puts the Matter at large. *Et per Holt*, If a Man lease his Houses, excepting his new House, during the Term, his Exception is good; but if he except it during Life, it is void: Or if a Man, having a Term of two Houses for certain Years, grants his Houses excepting one of them for Life, this Exception is void; for his Words (*during Life*) qualify the Exception, and shew his Intent, that the one House shall not be excepted during the whole Term, and so is void; which Difference appears in *Dyer* 264. b. but here the new House is excepted to the Lessor, &c. which makes a full Exception; and the Words, *to the Use of him only, &c.* do not qualify, but rather declare the Intent of the Exception. *Jud' pro Def'*. In this Case Plaintiff did not aver that the Lease was not expired at Time of the Fire.

No Action of the Case lies for Tenant at Will's negligently keeping his Fire.

Vide 1 Vent. 78, 106.

Meggadow versus Holt.

Action was brought upon a Bill of Exchange, in which Plaintiff declared, that the Defendant drew a Bill of Exchange, according to the Custom of Merchants, on *W.* Merchant at *Rotterdam*, payable to *H.* within two Usances and an Half, and alledged them to be at *Roterdam* two Months and a Half; and alledges the Custom, that if such a Bill be protested for Non-payment, the Drawer is liable; the Bill is assigned over, and alledged to be tendered to *W.* and that he did not pay: The Plaintiff protested, and brought his Action against *Holt*; & *per Curiam*, Judgment *pro*

Bills of Exchange.

pro Quer. 1st, The Law of Merchants is *Jus gentium*, and Part of Common Law, and *ergo* we ought to take Notice of it, when set forth in Pleading. 1 *Inst.* 11. b. 182. a. The Law of Merchants in this Case is, that if he, who has such Bill, does lapse his Time, and does not protest, or make his Request, if any Accident happens by this Neglect, in Prejudice to Drawer, he hath lost his Remedy against him; but if such a Thing had happen'd, it ought to have come of the other Side; and not being so, we must judge on the Declaration. It is not necessary to shew Custom of Merchants, but necessary to shew how the Usance shall be intended, because it varies as Places do.

Potter and James.

1 Sho. 347.
Comb. 187.
Postea Pasch.
13 W. 3. Pal-
mer v. Stave-
ly.

A *Sumpsit pro den' debit' & insolut'* not good, without setting forth any Contract, or for what the Money was due.

Anonymus.

On false Cap-
ture at Sea,
Admiral has
Jurisdiction.

WHERE there is a false Capture of Goods at Sea, the Admiral has Jurisdiction; and if they be brought to Land, the Common Law has; and the Cause may be brought in either Place, at Plaintiff's Election.

Anonymus.

Administra-
tion may be
granted to
next of Kin,
or to Wife.
Postea Hill.
13 W. 3.
Blackborough
v. Davis.

ADministration may be granted to next of Kin; or to the Wife, or next of Kin to the Intestate, as the Spiritual Judge pleases; the Wife shall come in for a Share by the new Statute; and as to Creditors, they are all one Administrator; the Court may divide the Administration, or give it all away as they please. But Husband shall have Administration of the Wife before all others; so if she has Credits.

Fisher versus Baston.

Inferior Court.

ERROR of Judgment given in an inferior Court *per seneschall' hic in Cur'*, and affirmed; for tho' if it be *per Seneschall'* only, without more, it would be ill, because it might be in a Tavern or other Place, yet being said *in Cur'*, shews it to be in Court judicially.

Rex & Reg' versus Maj' de Lond'.

A *Mandamus* to the Mayor and Aldermen of *London*, to restore Sir *J. Smith* to the Place of Alderman there. Return, that Sir *J. Smith* the 13th of *Feb.* was an Alderman of the City, being before that Time duly elected and admitted into the Office, according to the Custom of the said City; and that he so continued from the 13th of *Feb.* to the making of the Act for Abrogating the old Oaths and appointing new ones, and from thence to the 1st of *August* next following; but that he did not take the Oaths appointed by that Statute, nor hath since been chosen into the Place of Alderman; and therefore his Office being void by his not complying with the Act, they cannot restore him. The Difficulty rested solely upon the Statute for Reversing the Judgment given in the *Quo Warranto*; and whether this Return was not contrary to it; for if by that Judgment there recited, the Corporation was dissolved, then Return of his being Alderman is frivolous, and he not obliged to take the Oaths, not being an Officer at that Time, till Restitution of the Liberties of the City by the Act that was made after.

4 Mod. 52.
1 Sho. 274.
Carth. 207.
Mandamus to restore him to the Place of Alderman of the City of *London*.

Eyres: Return is sufficient; for it must be taken for true, till Party falsifies it by bringing Action, unless any Thing in the Act of Parliament alters the Case; for the Judges are obliged to take Notice of it being declared a publick Act, and nothing is in it to make Return contrariant. The Judgment entered in this Case was very different from what is recited in the Act; but the Court takes Notice of it only as it is there recited, which is, "That the Liberty, Privilege and Franchise of the Mayor and Commonalty, and Citizens being a Politick Body, and Corporate, should be seised into the King's Hands": By which Judgment the Corporation is not dissolved, so that Sir *J. S.* continued still an Alderman of that Body; the Judgment, in the most sensible Terms, is a Seising of the Corporation into the Kings Hand, which could not be; for that rests solely in Intendment of Law, and is inseparable from the Members; and what the King cannot have, Judgment of Seisure cannot give him.

Return must be taken as true till falsified.

2 *Cro.* 260. The Judgment here should have been a Judgment of Ouster; and this is such a Judgment as is without Precedent, which makes Suppositions. There are several Judgments for seising of Franchises, but never for seising of

Judgment may be of seising of Franchises, but not of Corporations.

of Corporations; the Corporation is always supposed to be prior in Law. *Palmer, 1 Case*. If a Corporation may be seised *nomine districtionis*, or otherwise it is dissolved; for when it is merged in the Crown, the King may make a new one, but cannot restore the old; a Corporation is something besides Franchises, for it is a Capacity to hold as a Natural Body; and tho' it may cease to be *in actu exercito*, yet it may be *actu signato*. Neither does a Seizure of Office dissolve one; for on making a Corporation, the King may reserve the Naming of Officers to himself, and suspend it for a Time. And it not appearing by the Preamble, what the Franchise is that was seised, it must be taken for Truth that he continued an Alderman; and he is not help'd by the other Clauses.

Gregory: The Court cannot take Notice of any other Judgment but what appears by the Preamble. *Dolbin* doubted. If the Return be true, they cannot restore Sir *J. Smith*; the only Difficulty is, whether it be possible to be true or not. Franchises that remain in the King may be seised; the Parliament does not declare it null from the Beginning, but only illegal. If it had been Liberties, &c. Sir *J.* should have been restored; but here it is only *præd* Liberty, but the enacting Clause is positive; *ideo dubitat*, and not willing that peremptory *Mandamus* should go.

Holt: The Writ is, that he was duly elected an Alderman, *secundum antiquas consuetudines civit' præd*. The Return agrees with the Writ, that he was elected, but that he did not take the Oaths. If this Act had not been in the Case, undoubtedly this had been a good Return. In this Act, by the Word (*Officers*), *Aldermen* without Doubt are understood; but if the Return be contrary to the Act, it must be rejected. If the King should now make such an Officer as an Alderman, it would not be good; for the Law understands no such Officer, but of a Corporation. By the Judgment, as recited, the Corporation is not dissolved. It was a *Quære*, whether a Corporation could be dissolved, but sure it may: It is such a Franchise as may be forfeited; but a Judgment of Seizure is no proper Judgment to dissolve a Corporation. There are three Sorts of Liberties; 1. That which did exists in the Crown before, as Fe-lons Goods. 2. Created *de novo*, which exist tho' forfeited, as Leet, Market. 3d Sort, which cannot exist but in Persons, and in that last, Judgment ought only to be for Ouster, for the King cannot have it himself: But Judgment final, that Liberty shall be seised and forfeited, will oust them

Vide 9 Co.
25.

them of Franchises. Here does not appear any Judgment actually given, that the Franchise being a Body Politick should be seised: The Liberty of the Mayor is not the Being of the Mayor; by a Surrender of Liberties and Privilege, the Corporation is not dissolved. 3 Co. Dean and Chapter of *Norwich's Case*, 70. 166. He agreed, if a Corporation were made to a particular Purpose, and they devest themselves of all Right, so that they cannot Answer the End of their Institution, it is thereby dissolved; as in the Case of a private Corporation for Charity, before the restraining Statute; but if the End of a Corporation remain'd, as in a Borough to make By-Laws and governing it, the Corporation remains still, and the making of By-Laws is no Franchise, but Part of the Constitution; and so as Matter stands no peremptory *Mandamus*.

D E

Term. Paschæ,

Anno 4 W. & M. 1692.

Hare versus White & Ux'.

TRespafs against Baron and Feme; upon General Issue Baron is acquitted, and Feme found guilty; and moved, that Baron should have been joined only for Conformity; and there is a Writ in the Register to that Purpose, 105. *b.* which ought to be pursued; and so is *Yelv.* 106. But *Curia contra*; For there is no Diversity in the Case of Baron and Feme, and where Trespafs is against any other two, and one of them is found guilty. *Cro. Jac.* 203.

Rex

Rex versus —

Order of Sessions on Appeal is final.

P*Emberton* moved to quash an Order of two Justices of Peace, made at their Sessions; which reciting a precedent Order made by two Justices, to remove a poor Man from *H.* to *B.* in the said County, because it appeared to them that he had rented a Farm of 10 *l.* *per Annum* in *H.* ordered he should be settled at *H.* and moved to have the Matter examined here; but *tota Curia contra*: But they agreed, that in all Cases where a Statute gives Appeal from two Justices to the Sessions, the Order on such Appeal is final, tho' the Statute does not expressly say so; and this Court cannot examine the Fact, but only quash the Order, if contrary to Law on the Face thereof. And *per Dolbin*, If a Conviction be on the Statute of Deer-stealers, the Fact cannot be after examined here; for the Parliament has made the Justices sole Judges of such petty Matters. Then *Shower* moved to quash the Order, because the Sessions ought only to quash or confirm the Order of Justices; yet they have not reversed the former Order, but order'd a Settlement at *H.* without more ado: But *per Dolbin* and *Eyres*, the Settlement at *H.* being the Place from whence he was removed, is a Reversal of the first Order. But *Holt* thought they had not Power to settle him at *H.* because it did not appear he had been settled there forty Days; for tho' he had a Farm there, yet it is not a Settlement, if he leaves it within forty Days: Then the Sessions ought to have quashed the first Order, but not to settle a poor Person who had no Settlement. But the other Justice *contra, absente Gregory*, it was confirm'd.

Loowder versus Screwdens.

4 Mod. 99.
1 Salk. 64.
In Appeal the Plaintiff must appear in Person, if not, he may be demanded, and nonsuited; the Appeal may be alter'd according to the Truth of the Fact, before it be filed.

IN Appeal of Murder the Plaintiff counts at Bar *in propria persona*, but the Roll put into Court, where the Count was entered, was by Attorney; and Exception taken, that the Appellant was nonsuited; for that he appeared by Attorney, where he ought to come in Person; and such Appearance is void, and so Nonsuit by Default; and if not Nonsuit, Appeal is discontinued, for he ought to appear *in-*

stanter, which he has not done; for at the Day of the Return of the Writ the Appellant ought to have counted *instanter*, but his Count was by Attorney, which is no Count; and then the Appeal discontinued. As if a Woman brings an Appeal *de morte viri*, and at Day of Return Parties appear, *sed Vic' non misit breve*, wherefore Plaintiff prayed an *Alias*, but Appellee demanded a Count, and because she refused Appellee was discharged. *Raft. App. 46.* cited. 1 *Bulst.* 70, 71. *Cur' contra*, Appellant here shall not be nonsuited; for none can be nonsuited that is not demanded, but he was not demanded; wherefore Appearance by Attorney can't be a Nonsuit. 2 *Inst.* 313. In an Appeal of Mayhem the Plaintiff came by Attorney, which could not be, and Plaintiff was demanded, and for Default nonsuited; but there it is plain, if he had appeared on Demand, he could not have been nonsuited: So here, if Appellee would nonsuit Appellant, he must have demanded him; but here Appellant was present and viewed by Court, and shall not be nonsuited, if demanded at a Day he is not demandable at. Then as to the Discontinuance, that cannot be before Imparlance; but the Day the Court took to advise shall not make a Continuance, but shall be intended the first Day. It is true, the Appellant had a Day by the Roll and by the Writ, and on every one of them is demandable. In the Case in *Raftal*, he came on the Day by the Roll, and because he refused to count, the Appeal abated; here he appears on the Day given by the Writ, and has counted, and that in proper Person as he ought; and tho' Roll be *per Attornat'*, that shall be altered; tho' an Appeal cannot be alter'd at Common Law, nor by any Statute of *Jeofail*, yet it may be altered according to Truth of Fact, before it is filed or becomes a Record; whereupon the Roll was amended, and Defendant pleaded *Non culp'*. And it was said in this Case, that where Grand Jury or Inquest finds a Man guilty, he is ousted of Battail on Appeal.

Ferrers versus Miller.

IN Ejectment Defendant pleads in Abatement, that the Land was ancient demesne, without making a Defence; for he said, *Venit & defendit*, without saying *Vim & injuriam*, &c. and no Pleading can be, unless he make himself a Party by Defence. 1 *Inst.* 127. *b.* unless it be in Assise or *Scire fac'*, for there no Defence is to be made; but in all

Carth. 220.
Salk. 217.
Plea, where no
Defence is
made, need
not be received;
but by
Accepting it,
it is good.

G

personal

personal Actions the Plea says, *Venit & defendit vim & injuriam*, &c. tho' it be usual in Pleas in Abatement to leave out the Word *Quando*. But on the other Side it was said, the Precedents were both Ways, and it was adjudged good without *Def' vim*; but unless he makes himself Party to the Writ, by making Defence, you are not bound to receive his Plea; but if you do it, it is good.

Rex & Regina versus Warrington.

4 Mod. 65.
1 Sal. 152.
Carth. 214.
Comb. 191.
Where there
are two Sher-
riffs, and one
is challenged,
the *Venire*
must go to
the other, and
not to the Co-
roner. If Sher-
riff dies, no
Process shall
issue till an-
other be made;
and Process
shall not go to
the Coroner.

Information against Defendant for a Riot in *Chester*, which is a County Palatine, and therefore to be tried there; and a Suggestion being entered on the Roll, that the Sheriff was of Affinity with the Defendant, the *Venire fac'* issued to the other Sheriff only, and a Jury returned; and Defendant found Not guilty, and the Record removed hither. And moved in Arrest of Judgment, that the *Venire* was ill directed, for it ought to have been to the Coroners. But *Cur'*, *Holt* delivering it; the *Venire* is well, and Trial good, and so adjudged before between Sir *D. Rich* and Sir *Tho. Player*; where the *Venire* was directed to Sir *D. North* only, the other being a Party. For the Sheriff is the proper Officer, to whom the Return of Writ belongs; and the Law does not commit it to others, without Default or Partiality suspected, and then constitutes the Coroner; but where there are two Sheriffs, and only one of them suspected of Partiality, and for this Defect is challenged, his Companion is as proper a Person to supply that Defect as the Coroner. But it is said, both Sheriffs make but one Officer, yet every one of them is a Sheriff; the Coroners are but one Officer, 1 *Mod.* 198. yet if there be two Coroners, and one of them be challenged, and if four, and three be challenged, the *Venire* shall go to the other; but if none, it is directed to them all: So *Venire* is not to be directed to the Coroners, but on Default of Sheriff. If Sheriff dies, Process does not issue 'till another be, and shall not go to the Coroners. It is the Challenge only makes the Coroners or any of them Officers; and why may not the Challenge as well make the other Sheriff an Officer. In a *Quare Impedit* against Archbishop of *York*; if he be found Disturber, the Writ *de admittenda idonea persona* goes to Archbishop of *Canterbury*; yet he has not Superiority, but only Precedency. *Dyer* 327. And *Venire* well awarded.

A

Pitcher

Pitcher versus Tovey.

ERROR of a Judgment in the Common Pleas in Covenant; wherein the Plaintiff declared, that by Indenture bearing Date 9 *July* in the Year 1680. he demised a House in the Parish of St. *Martin's, &c.* rendring Rent, with Covenant for Payment to *R. Gill*, who assigned to Defendant; and for Rent arrear for three Years after Assignment, he brings Covenant; Defendant as to Part pleads *Nil debet*, and as to the Residue an Assignment over before it incurr'd. Plaintiff demurr'd, and Judgment by three Judges in the Common Pleas for the Plaintiff; and it was urged for Defendant here, who was Plaintiff below, that there was a Privity of Estate, tho' no Privity of Contract, between Assignee of a Term and Lessor, after Acceptance of him for Tenant, which continues notwithstanding the Assignment, 'till Notice of it: As if Tenant makes a Feoffment, the Lord shall avow upon him for Rent arrear 'till Notice of it. 3 Co. 23. a. And so it was adjudged in the Case of an Assignee of a Term, 1 Sid. 339. by two Justices; and *Twisden's* Reason to the contrary not good, that the Lessor had Remedy by Distress; for there is no Reason that the Lessor, who had two Remedies, should be deprived of one of them; for he cannot have Debt, where the Party to whom the Term is assigned is not known to him; and perhaps his Remedy by Distress may fail, where the Assignment is to a poor Man, who is not able to manure the Land, or by Indigence or otherwise suffers it to lie fresh, and then the Lessor shall be without Remedy, by Distress, or by Action of Debt; and such Notice ought to be pleaded, as in the Case of *Marrow* and *Turpin*, 3 Co. 24. a. But *per Cur'*, *absente Gregory*, Judgment was reversed; for Debt lies by the Lessor against the Assignee only upon Privity of Estate, and when this fails by the Assignment over, that Action is at an End; and is not like an Avowry, which shall be made on a Person certain. That of Sid. 339. was hastily resolved by two against *Twisden*, and the Bar thought it new Law. The Lessor is not at such great Prejudice as is pretended, for he may distrain, or have Covenant against the Lessee or his Executors; and if there be no Covenant for Payment, he may have Debt against the second Assignee, when known; and if that were not so, it was his own Folly that he accepted the first Assignee for Tenant, by which he gave him a Liberty of Af-

Vide 3 Lev. 295.
4 Mod. 71.
Salk. 81.
Carth. 177.
1 Show. 340.
Lessee assigns the Term to a Person who assigns to A. without Notice to the Lessor; Lessor cannot have Covenant against the original Lessee for Arrears of Rent, after the Assignment to A.

signment

signment to the other, and discharged Lessee. Judgment reversed, and *Nil dictum* as to Point of Notice.

Trial on the Custom of the Manor of Bray.

Where Original is Evidence, Copy of it is so.

ON Evidence, the Court said, that a Copy of a Court-Roll of a Manor is good Evidence; for wherever the Original is Evidence, there a Copy is. Copy of a Probate is good Evidence. Sir F. L. was refused to be a Witness of a Custom, because he claims by it; but any Tenant of a Manor, that Claims not by the Custom, is a good Witness.

Anonymus.

Intire Damages.

PER Cur', Where a *Continuando* in Trespass is impossible, and intire Damages, Court will intend that nothing was given for the *Continuando*, because impossible.

Anonymus.

Trespass without *vi & armis*, ill.

IN Trespass the Declaration was without *vi & armis*; upon general Demurrer, this Omission is fatal, for it is Substance, and alters the Entry of the Judgment, which ought to be with a *Cap'*, when the Action is *vi & armis*, otherwise with a *Misericordia*.

Bush versus Cole.

Carth. 232.
1 Sho. 388.
An Exception of a Passage in a Lease, being not Part of the Thing demised, but *de hors*, amounts to a Reservation, and Covenant will lie.

COVENANT; Plaintiff declared, that he leased to A. a House for Years, excepting two Rooms, with free Ingress, Egress, &c. *per le Parlour, Hall, &c.* and after Lessee assigns to Defendant, and alledges Breach, because Defendant had stopp'd the Passage; and on Demurrer, that these Words do not make a Covenant, for they are only the Words of Lessor, and not like 1 *Saund.* 321. where Covenant was maintain'd on the Word *dimisi*; for there the Use of a Pump was leased by him against whom the Covenant was brought; but here they are the Words of him who brings Covenant; and if Covenant lies, it is not maintainable against Assignee. But *per Cur'*, Covenant lies against Lessee and Assignee too; for it is expressly laid, that Demise was to him and his Assigns.
And

And *Eyres* said, the Diversity was as taken in the Lord *Russell's* Case, where the Demise was of Land, except a Close, and agreed, that Covenant did not lie for Disturbance in this Close; but where the Exception was of a Thing *de hors* to the Lessor, as a Way, Common, Estovers, or other Profit *aprender*, that is by Agreement of Lessee, the Lessor shall have them; and therefore Covenant lies. 3 Cro. 657. Mo. 553.

Bruges versus *Leer*.

Prescription for Common for Sheep; Jury find, he had Common for Sheep *prout* he declared, and *ulterius dicunt*, he had Common for Cows too; and moved, that the Verdict did not warrant the Prescription, because entire; and another is found than that on which Plaintiff declared; but *per Curiam*, the Common is several, distinct and different, for he that prescribes for Sheep cannot therefore prescribe for Cows; and *Holt* cited *Johnson* and *Throughgood's* Case, *Brown* 177, 178. which is the very Case in Point. *Jud' pro Quer'.*

4 Mod. 89.
Common laid
for Sheep and
found for Sheep
also; good,
for they are
distinct.
Vide Hob.
209.

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D E

D E

Term. Sanct. Trin.

Anno 4 W. & M. 1692.

Culliford versus Blanckford.

Comb. 194.
 Carth. 232.
 4 Mod. 129.
 Suit commen-
 ced by *Latitat*
 for a false Re-
 turn of a Mem-
 ber of Parlia-
 ment, is a
 good Com-
 mencement of
 a Suit. By
 three Judges,
contra Holt.

DEBT for 4*d.* by Plaintiff, a third Person, against the Defendant Mayor of *Dorchester*, upon the Stat. of 23 *H. 6. c. 15.* for falsely returning Sir *R. Napper* to be duly elected Member of Parliament, whereas Sir *T. T.* was duly chosen; the *Postea* was stayed on two Questions that arose at the Trial. 1st, Whether the Plaintiff was a common Informer within the Stat. of 31 *Eliz.* and so obliged to commence his Suit within a Year; for the Return was made 3^d of *March 2 W. & M.* and the *Latitat* taken out the 12th of *February* the same Year, but Bill not filed till 3^d of *April 3 W. & M.*

2. Whether the Suit commenced by taking out of the *Latitat*; for if so, the Action was brought within the Year: *Eyre* and *Gregory*, as to the first, were of Opinion, that Plaintiff was no common Informer within 31 *El. c. 5.* because by 33 *H. 6.* the Penalty is wholly given to the Party grieved, or in his Default, to him that will sue for it; and 31 *El.* extends only where it is given to King, or to King and Informer; but where it is given to Party only, it is *Casus omissus*, and remains as at Common Law; and so is *Noy 71.* in the Case of the Party grieved, and the Action be brought *tam quam*, yet it is only to have a *Capiat*; and if the Party had died, the King could not proceed, as he may do when the Penalty is given to both.

Dolbin dubit; and *Holt* was of Opinion, he was a common Informer within the Statute; for this is a popular Action, and the Penalty to him that will sue.

2. *Eyres, Gregory and Dolbin*; The *Latitat* being taken out within the Year, the Suit was sufficiently commenced; ^{1 Vent. 28.} and compared it to the Case, where the Statute of Limitations is pleaded, the Plaintiff may reply, that he purchased a *Latitat* within the Time, *ea intentione* to declare in the Action. ^{1 Sid. 53.} and this shall save his being barred. *Holt* agreed that Case, because it was to save an old Right of Action vested, but he knew never an Instance, where suing out a *Latitat* did save a Limitation of an Action of Debt upon a penal Statute; but the Time of Commencement ought to be reckoned from filing the Bill. Besides, there was no need of suing by Bill for such Penalty, but it might have been by Original. But notwithstanding, Judgment *pro Quer* by the other Three. *Hall* and *Wymark's* Case.

Rex & Regina versus Prat.

A Man took an Apprentice in Husbandry, according to ^{5 El.} who died before Time for Service was expired; and the Apprentice being impotent and a Cripple, the Justice of Peace, by Order of Sessions, sent him to Executor, and ordered him to keep him; and it was quashed, because the Inconvenience would be great, if Executor should be forced to obey it; for perhaps he has not Assets; and it cannot be tried whether he has or no, upon a Proceeding at Sessions: Besides, the Executor may be in another County, and then cannot be charged with this Order. And *per Eyres*, An Apprenticeship is a personal Trust between Master and Servant, and is determined by Death of either; because the End and Design of it cannot be obtained; for the Executor may not understand the Trade in which he is to be instructed. Perhaps an Action of Covenant may lie against Executor, upon the Contract of Testator; but there he may make his Defence, by Pleading not Assets; and therefore this Case differs from ^{1 Sid. 216.}

The Master of an Apprentice in Husbandry dies, the Justices at the Sessions order his Executors to keep him, quashed; said perhaps Covenant might lie against the Executors.

King and Glide.

M *Andamus* to restore *Glide* to his Place of Alderman of ^{4 Mod. 33.} *Exon*; they return, that *Exon* is an antient City, removed for absenting himself from the City, and not attending, *licet summonitus*; held well by three Judges, *contra Holt*, who held a particular Summons was necessary.

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ing of eight Aldermen and ten others, who were the Chamber and Common Council of the said City; who used to meet, on due Summons, for the better Government of the Corporation; and that for Misdemeanors in the Aldermen, this Court used to amove them: That *Glide* was chosen an Alderman, and by Virtue of that Office was a Justice of Peace in the said City; but that he removed himself and his Family from the said City to *Topsham*, & *præd' Civitatem deseruit & reliquit*; by which he neglected the Duty of his Office, and came not to several Councils there held, and declared he would never come more; and for these Reasons, at a Court held, of which he had Notice, and *licet summonitus fuit* he did not appear, they disfranchised him.

Eyres: No peremptory *Mandamus* shall go; because he being an Alderman, and having removed his Habitation from the City, has given good Cause of Disfranchisement; for it is incident to the Place and Duty of an Alderman to assist in the Government of the City, and to be resident there to that Purpose: Besides, an Alderman's Place is not a Place of Profit, but all the Advantage of it consists in Freedom, Precedence and Authority; and if he remove himself from thence, he is incapable of enjoying these Privileges. *Et quod deseruit & reliquit* is a sufficient Return, altho' it does not appear but he might have return'd again, this could not purge his Offence and Forfeiture, but he continued still removeable for it. As if Tenant for Life make a Feoffment in Fee on Condition, and enter for Condition broken before Lessor takes Advantage of the Forfeiture, yet this does not purge it. But as to his saying he would return no more, this would not help the Return, because no Obstacle to his coming again; but he must have been summon'd before they disfranchised him; but being removed thence, no Summons is necessary. *Gregory accord' in omnibus*, adding, that if *Glide* had declared his Resolution of not coming again to the Mayor, it would be a Disfranchisement. *Dolbin*: The Cause of Disfranchisement had been good, if well returned; but he said, *quod deseruit & reliquit* generally, was not good, without any Allegation that he never returned again; for if he return'd before the Disfranchisement, it would be a sufficient Cause to prevent it; but it being returned, that he came not to Court according to Summons, this makes the Return full.

Holt: I agree, that his Absence, &c. was a good Cause to disfranchise him; but here is no sufficient Summons returned, for he ought to be summoned to answer his Faults before Disfranchisement. It's true, it is alledged that *licet summonitus* he did not attend; but a general Summons will not avail; for they can't, when they have him in Court, object and deprive him for any Misdemeanor, but the Summons to this Purpose ought to be particular to answer to such and such Faults. But if it appear, that he was not an Inhabitant within the City at the Time of the Court held, there is no need of averring a Summons; yet tho' he left his Habitation, yet possibly his Return might cure his Default before; and if he does return, and they did not summon him, he could not be deprived; for perhaps he could have alledged some good Cause for his Departure, as Sickness, which might have satisfied the Court; for the Difference is, where they might have an Opportunity of summoning him, and where not; and this being a Return ought to be certain to every Particular, because the Party has no Answer to it; but it might have been good in an Action on the Case, where he might have replied to it. 3 *Bullst.* 189. 1 *Rol.* 409. It was returned to a *Mandamus*, that thirty of the Common Council, in the Council Chamber assembled, removed the Plaintiff; and this was ruled to be ill, because it was not alledged, that the Common Council was held for this Purpose; for the Common Council might have come to a Feast, and not as a Court: So in this Case, tho' *Glide* left the Place, yet there being a Possibility of returning again before Disfranchisement, and upon such a Return a Summons being necessary, before he could be removed; and it not appearing on the Record, that he did not return, the Disfranchisement must be taken to be naught. But on the Opinion of the other three, no peremptory *Mandamus* was granted.

Vide 1 Sid. 14.

Vide postea
Hill. 7 W. 3.
Fletcher v.
Ingram.

D E

Term. Sanct. Mich.

Anno 4 W. & M. 1692.

*Williams versus Salisbury.**Hic prolat'*
help'd by
Verdict.

THE Want of *Cur' hic prolat'* help'd after Verdict, by the Statute of Oxford, *profert hic in Cur' literas Administratorias* Form after Verdict, but Substance on Demurrer. *Vide Hob. 233. Vide postea Pasch. 5 W. & M. Morley and Vivian.*

Special Bail but discretionary in Covenant.

Per Holt: If Plaintiff brings Error of Judgment for Defendant, it is reviving the first Action; and then it is proper for the Court to give such a Judgment as he should have had below: But if Defendant brings Writ of Error, it is only to be discharged.

King and Hicks.

4 Mod. 158.
Information
for using a
Trade, not
being seven
Years Appren-
tice there-
to, must be
brought in
the proper
County.

INformation on 5 *El. c. 4.* for not being an Apprentice for seven Years, brought in *B. R.* tho' the Trade was used in *Yorkshire*; & *per Cur'*, it does not lie; tho' it was objected, that it was not brought by a common Informer; and where Debt was brought upon a penal Statute, *Hale* held it maintainable, *Bains* and *Hughs*; for the Statute of 21 *Jac.* not only enacts, that all Offences against a penal Statute, for which an Informer may ground any Actions, Bills, &c. before Justices of Assize, &c. shall be sued before Justices of Assize, &c. of the County where such Offences

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are

are committed; but also that all Informations, &c. sued at *Westminster*, for such Offences, shall be void. *Per Dolbin*: It was adjudged by *Hale*, that Debt did not lie, tho' it was doubted by him. *Per Holt*: It was adjudged in Exchequer-Chamber, that Debt did not lie in *Westminster-Hall*, upon a penal Statute, for an Offence in other County, in a Case where he was of Counsel.

Postea Mich.
10 W. 3.
Clayton v.
Kynaston.
3 Lev. 71.
contra.

King and Queen versus Portington.

Ejectment upon a Superstitious Use; *per Holt*, the Statute of 23 H. 8. c. 10. makes Superstitious Uses void, but does not give them to the King. 1 Ed. 6. gives to the King, but does not extend to future Uses since. Wherefore it would be convenient for the Heir to seek Remedy in Parliament, according to Mo. 784.

l.c.
Salk. 162. 3. Salk. 334.
Superstitious
Uses void;
and tho' by
1 Ed. 6. given
to the King,
that does not
extend to fu-
ture ones.

Ball versus Briggs.

DEBT *sur* Escape; Defendant pleads fresh Pursuit, and Re-taking of the Party the same Day the Bill was filed; and adjudged no Plea, the Action being once attach'd in the Plaintiff. 1 Jo. 145.

Escape.
Vide 3 Co.

D E

Term. Sanct. Hill.

Anno 4 W. & M. 1692.

Symonds versus Cudmore.

4 Mod. 1.

1 Salk. 338.

Carth. 257.

Skin. 284.

317, 328.

1 Jon. 60.

Bridg. 27.

1 R.A. 843. 3.

Tenant in Tail, Remainder to himself in Fee, makes a Lease for Years to commence *in futuro*, and dies before Commencement of the Term, the Issue levies a Fine, the Lease is good against the Conusee.

TENANT in Tail of a Reversion expectant upon a Lease for Years, with the Reversion in Fee to the same Tenant in Tail, makes a future Lease and dies; the Issue, before the Commencement of the future Lease, levies a Fine; and the Question was, whether the Conusee should avoid the Lease.

Eyres: He shall not; the Lease is not void, but voidable; it takes hold of the Estate-tail, and charges it after the Determination of the first Lease, and by Possibility might have begun during Tenant in Tail's Life; tho' it would have been void, if made to commence after his Death; because it should not have issued out of the Tenant in Tail's Estate, but the Issue's; but now as this stands, it is only voidable. 1 *Inst.* 46. *b.* *Cro. El.* 718.

But supposing the Lease to be void as to the Issue, yet neither he nor Conusee can avoid it; not the Issue, because barred by Fine; nor the Conusee, for the Lease issues out of both the Estates which pass'd to him by the Fine. 1 *Co.* 47. *b.* Where King, Tenant in Tail with Reversion expectant, grants the Land in Tail, if it were the Case of a common Person, held it should operate on both Estates; and 1 *Cr.* 103. *Hutt.* 96. The Rent issues out of all the Estate, according to Rule in 5 *Co.* 17. *b.* and rather than Lease should be void, it shall issue both out of the Reversion

sion in Tail and Remainder in Fee; now the Tail is extinguished, and the Conufee is seised of a Fee only, and so the Lease unavoidable as derived out of it. And that the Fine consolidates both Estates, and utterly extinguishes the Tail, as to Issue, is proved, 2 *Leo.* 37. 3 *Co.* 51. b. 1 *Cr.* 478. *Hob.* 258, 323. And all the whole Court held with him in the 2d Point. And *Holt* and *Gregory*: The Lease is not void, not on Tenant in Tail's Death, for if it was, no After-act could make it good, 1 *Rob.* 260. but it may be made good; so is *Bridgman* 28. *Dyer* 46. 2 *Bulst.* 44. And therefore the Issue has Election to avoid it by Entry, or make it good by Acceptance of Rent; and the Issue, if he had staid 'till the Lease was out, he might have avoided it; but the Conufee shall not have that Privilege, because none but Privies in Blood shall avoid such Lease. *Dolbin accord' in omnibus*, and said, *Siderfin* was mistaken in the Report of *Oyus* and *Thomasius's* Case, as to Time and true Stating.

Holt agreed to the Judgment, but differed in some Things; and said, if the Lessor and Conufor had been seised of a Reversion only, he should have been of Opinion for the Plaintiff, that the Lease was void; for if Tenant in Tail make a Lease at a Day future, and dies before Commencement, it is void at Election of Issue. 1st, Because the future Interest is no Estate 'till actual Entry, and till then Tenant in Tail is seised; for before, such Lessee has only a Right. 1 *Inst.* 201. *Litt.* § 58, 459. And Entry being necessary to a Title, it is defeated by Tenant in Tail's Death; and if Lessee after enters, the Heir may have Trespass against him. *Dy.* 279. It is held to be a void Lease, not because it issues out of the Estate of the Issue only, for it charges the whole Tail; but the true Reason is, because the Lessee has no Title to enter 'till Possession devolv'd to Issue, who has a precedent and paramount Right; and be there a Possibility of Commencing during the Tenant in Tail's Life, who is Lessor, and it does not commence; or be it limited to commence after his Death, the Lease is void to charge the Possession of the Issue. 2. Where Tenant in Tail makes a future Lease, there is no Act appointed by Law, by which the Issue can avoid it, 'till after Tenant in Tail's Death; and after his Death, he can neither enter nor make Claim, or bring Action, which are the only Ways of defeating an Estate; yet there is none of them necessary to prevent such vesting: Therefore the *Interesse termini* is void as to the Possession of the Issue, who has Power to avoid it. And he compared it to the Case in 4 *Co.* 53. 1 *Inst.* 218. Feoffment in Fee, on

Vide tamen
1 *Inst.* 185. a.
186. b.

Condition to pay a Sum of Money at a Day certain, afterwards the Feoffee makes a Lease of the Land to the Feoffor, and does not perform the Condition, the Fee shall be adjudged immediately in the Feoffor; for he could not enter, and need make no Claim, because in Possession; and there would be a Circuity, if Law were otherwise; for the Issue must permit the Lessee to enter, and then oust him; and besides, this Lease was made by a Tenant of a Reversion; then Suppose he had granted over a Reversion and died, the Grant would have been void, 'till Issue had done some Act to confirm it. *Litt.* § 608. 3 *Co.* 84, 85. And if it shall be so in the Case of a Grant of Inheritance, *a fortiori* in the Case of a Lease.

Now the Fine levied does not corroborate the Lessee's Estate, nor is there any Election in the Issue. *First*, Because the Time of his Election was not come, which was not to have been 'till after Commencement of the Lease. 2. When a Thing or Estate is or is not at the Election of any Person, the Levying of a Fine shall not extinguish the Election, but only convey the Estate. 1 *Cro.* 302. And there is a Difference between a Power to make a Lease good, and an Election to make it good or void; but when the Conusor has, by Acceptance or Distress, affirmed the Lease, he shall be concluded to say, the Conusor was Issue in Tail; which was first held *Plowd.* 437. And in another Age, *Coke* of the same Opinion*; but there being no such Act in this Case, if this had been the Point only, Judgment ought to have been for the Plaintiff.

* 1 *Inst.* 47.
1 *Rol. Ab.* 190.

Bondler versus Orabb.

A Mistake of a Clerk through Carelessness, in an Inferior Court, is amendable; but not if through Want of Skill.

Can and Cary.

Raym. 3.

WHERE an Agreement is at Land, and a Performance is at Sea, it shall be tried where the Agreement is made: And saying *in partib' transmar' infra paroch'* is idle.

D E

Term. Paschæ,

Anno 5 W. & M. 1693.

Anonymus.

WHERE a Common or Way is claimed, the Title ought to be set forth in the Declaration; but for a Fair, or Franchise, which is no Charge to another's Soil, there *Habere debuiſſet* is good without further: *Per Holt.*

Holt: One cannot take Advantage of an Original, tho' never so vicious in Recital, without craving Oyer of it.

Hicks and Harris.

MOTION against a Rule for a Prohibition granted, on a Sentence in the Spiritual Court about an incestuous Marriage, to declare it null and void after Death of one of the Parties. *Holt*: The Reason of Sentence is to prevent their living in Incest, and there is no Occasion for it here; then the Party might have disproved the Evidence, if alive: They cannot give a Sentence to bastardize the Issue, that is only by Consequence: And if they incroach on Common Law, tho' they have original Conusance, we will prohibit. And Prohibition *quoad* to declare Marriage void granted.

4 Mod. 82.
Carth. 271.
Salk. 548.
Comb. 200.
Suit in Spiritual Court to annul an incestuous Marriage, pending which, one of the Parties dies; Prohibition shall go, as to annulling the Marriage.

De

De la Bastile verſus Reignald & Ux'.

4 Mod. 183.
 Skin. 337.
 Com. 200.
 Carth. 286.
 Vide 1 Inſt.
 135.
 In a *Homine replegiando*,
 where the
 Party appears
 on the Day
 Proceſs is re-
 turnable, and
 pleads *non ce-
 pit*, there is
 no need of
 Bail; and a
Superſedeas
 ſhall go to
 the *Withernam*.
 Poſtea Mich.
 12 W. 3.
 More v.
 Watts.

IN a *Homine replegiando*, on the iſſuing of the *Writ*, the Defendant entered an Appearance before the Return of the *Writ*, with the Filazer; the Sheriff returned *Elongavit*; upon which *Withernam* was awarded, and *Superſedeas* moved for, becauſe Appearance was enter'd, and offered to plead *non ceperunt*; and they ſaid, wherever an *Elongavit* is returned, and Defendant offers to appear and plead *non ceperunt*, it ſhall ſtay the *Withernam*; becauſe the End of the *Writ* is only to bring in the Defendants to appear and plead; and this the other Side agreed to; and only prayed, that the Defendants might gage Deliverance before it was granted. *Holt*: There is no Difference between a Replevin and a *Homine replegiando*; for as the Sheriff can return nothing but an *Elongavit*, where he cannot find the Thing to be replevied in one Caſe, ſo neither can he in the other; and as to gaging Deliverance, he held that was to be done by the Plaintiff, only where the Thing is replevied. Then moved that Defendant ſhould find Bail. But *Holt*, where the Party appears on the Day Proceſs is returnable, and pleads *non cepit*, there is no need of Bail; wherefore *per Cur'*, a *Superſedeas* to *Withernam* was granted without Bail.

Hodges verſus Steward.

Bill of Ex-
 change pay-
 able to A. or
 Bearer, not
 assignable.
 Comb. 204.
 Salk. 125.
 Poſtea Paſch.
 12 W. 3. Car-
 ter and Pal-
 mer acc.

CASE *ſur* Bill of Exchange; Plaintiff declares on the Custom of *London*, that where one Merchant draws a Bill on himſelf, payable to another or Bearer, and the Perſon, to whom it is payable, indorſes it to a third Man, the Indorſee, on Refuſal of Payment, may bring an Action againſt the Drawer: And ſays, the Defendant drew ſuch a Bill to F. who assigned it to Plaintiff, *unde accrevit*, &c. *Per Cur'*, There is a Difference between Bill payable to F. S. or Bearer, and a Bill to F. S. or Order, and one is not assignable by the Contract, the other is; there is no Authority given to assign by the one, by the other there is. 2. This is a good Bill between Indorſer and Indorſee, for the Indorſement is in Nature of a new Bill. 3. 'Tho' there is no Averment of Defendant's being a Merchant at the Time of drawing the Bill, yet the Drawing the Bill was a ſufficient

ficient Trading and Negociation to this Purpose; and *Holt* cited *Sarsfield* and *Witherley's* Case: Action against *Witherley*, upon a Bill of Exchange, he pleaded no Trader, but a Gentleman sent into *France* to travel, and for Convenience of a Return drew this Bill, &c. and Judgment *pro Def* in the King's Bench; but it was reversed in Exchequer Chamber, because his Drawing a Bill made him a Trader within the Custom of Merchants, as to a Bill of Exchange.

4. The Plaintiff having declared on a special Custom, for a Bearer to have an Action, and Defendant having demurr'd, instead of traversing it, tho' in Truth there be no such Custom, has confessed it; and so Judgment *pro Quer'*. For tho' Court shall take Notice of Law of Merchants, and if Action had been brought upon it, that Demurrer would not have concluded the Court to give Judgment for Plaintiff, or forced them to determine a Thing otherwise than the Law directs; yet they cannot take Notice of Customs of Particular Places; and the Custom in Declaration being sufficient to maintain Action, the Defendant by confessing it by Demurrer has given Judgment against himself. 5. A general *Indeb' Assump'* will not lie upon a Bill of Exchange, for Want of Consideration; but Bill is but Evidence of a Promise, and so but *nudum pactum*; and therefore he ought to bring a special Action upon the Case, upon the Bill and Custom of Merchants, or else a general *Indeb'* for Money received to his Use.

Hard. 486,
487.

Davy and Nichols versus Smith.

AT a Trial upon a feigned Issue in Assise, directed by House of Lords, concerning a Will of Lands made by *J. S.* the Question was, whether the Witnesses to the Will had pursued the Direction of the Statute of Frauds and Perjuries, in Subscribing their Names. And *per Cur'*, If Testator lay in a Bed in one Room, and Witnesses went through a small Passage into another Room, and there set their Hands at a Table in the Middle of the Room, and opposite to the Door, and both Doors open, so that Testator might, if he pleased, see them, tho' no Proof he did see, it is sufficient within the Statute; and therefore said, if Witnesses subscribe in the same Room where Testators lie, but Curtains of Bed drawn, this is a good Subscription; and because it is in the Power of Testator to see, it shall be construed to be in his Presence.

If Testator might see the Witnesses subscribe, 'tis a Subscription in his Presence.

Vide 3 Mod.

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Opy versus Adison & al.

Salk. 31.
Consent of
Courts 422.
Mariner's
Wages suable
in Admiralty
Court, if by
Parol; *aliter*
if by Agree-
ment under
Seal.
Vide postea
Trin. 12 W.
3. Clay and
Snelgrave.

Motion to discharge a Rule for Prohibition to the Court of Admiralty, in a Suit for Mariners Wages, upon Suggestion of a Contract in Writing made for them at Land. 1. Because they have a Jurisdiction; and *per Cur'*, it is allowed, and nothing but constant Practice affirms it; but if there be a special Agreement, that Mariners shall receive Wages *in any other Manner than usual, or if* the Agreement be under Seal, in both these Cases Prohibition shall go; but where it is in Writing only, it is but a parol Agreement, and therefore they have Power, as here. Then said, there was no Libel, then there could be no Prohibition; but *per Cur'*, if there be a Citation, and the Ship arrested, tho' no formal Libel, it is sufficient: But on the first Matter, the Rule was discharged. *Note*; This was said to be otherwise by Court upon Motion in *B. R. Mich. 4 Annae*, in a Case between *Barr and Barr*, which was moved by *Mountague*.

Morley and Vivian.

Vide ante
Page 30.

E*T hoc paratus est verificare* held to be only Form; and tho' it has been held Substance, yet subsequent Opinions have been contrary.

Davis versus Speed.

Parl. Ca. 104.
Salk. 675.
4 Mod. 153.
Carth. 262.
Husband seisd
in Right of
his Wife, co-
venants with
her to levy a
Fine to the
Use of the
Heirs of his
Body on her
begotten; the
Limitation is
void.

Ejectment; Husband and Wife, seisd in Fee in Right of Wife, levied a Fine to *J. S.* and his Heirs, to the Use of the Heirs of the Body of the Husband, begotten of the Wife; and for Want of such Issue, to the right Heirs of the Husband; Wife dies, Husband dies without Issue; Question who should have the Land, Lessor of Plaintiff as Heir to Husband, or Defendant as Heir to Wife. *Darnel pro Quer'*, A particular Estate arises to Husband by Implication, tho' this be not a Covenant to stand seised, like *Pibus* and *Mitford's Case*, *Mod. Rep.* 122, 159. where the Estate for Life arose out of the old Estate of the Covenantor new moulded; and to the Purpose 1 *Rol.* 240. 1 *Inst.* 22. *b.* That an Estate should be raised to Husband by Implication; but those Cases are of Conveyances made by him who had the Estate before; but

in this Case, the Husband had no Estate before, but all was in the Wife; but notwithstanding he said, that the Husband having Power to declare the Uses of the Fine, and perhaps having Issue at that Time, and by that intitled to be Tenant by the Curtesy, he might not think it necessary to make a Limitation to himself. But supposing he shall have no Use by Implication, yet he shall have a Remainder as a springing Use; and there is no need of Freehold to support such Remainder. 1 *Lev.* 101. *Mo.* 720. But the Feoffees have a *Scintilla juris* to execute it when it comes.

Northey contra; There is no Alteration made by the Fine, but the Wife is in of her old Estate, there being no Person to take a Freehold in Possession. Such an Estate might not be good at Common Law; but since the Stat. of 27 H. 8. Uses must be subject to Common Law, and no Fractions can be made in an Estate settled to Use. 3 *Cro.* 334. 2 *Rastal* 797. 1 *Cro.* 321. And the Case in the *Modern Reports* not like this; for that was a Covenant to stand seised, and this is by Transmutation of Possession; and there is no Estate left in the Feoffee or Conusee, but only a Possibility to serve future Uses. 1 *Co.* 157. The Notion of a springing Use has been set up to set a Fee upon a Fee; but it was never known that the first Use was a springing Use.

Holt: The first Use may be a springing Use; for if I bargain and sell to the Use of another five Years hence, this is a good future Use; there is a Difference between a Covenant to stand seised and a Feoffment to Use; for 'till Contingency happens, or the Time comes for the future Use's rising, it shall return again to Feoffor: A Feoffment to the Use of the right Heirs of J. S. after the Death of J. S. is a future Use; but if it were limited to rise after the Death of one without Issue, this is void without a particular Estate to support it. So is *Pell* and *Brown's Case*, unless the dying without Issue be within a certain Term, as within the Life of a Man; for otherwise the Law will not expect the vesting of it, but will construe the Limitation to be void, because the Possibility is foreign; *Holcroft's Case* in *Moor* is express. *Jud' pro Def.*

Postea Pasch.
6 W. & M.
Goodright
v. Cornish.
Postea Pasch.
11 W. 3.
Scattergood v.
Edges.

Indictment against *Ch. Knowles Esq*; for Murder; Misnomer pleaded, and prays to amend something in the Plea.

Holt: You cannot amend, for it is in Parchment, and so a Record; but when in Paper it is only a Warrant to make a Record by. *Eyres* and *Dolbin*: No Difference between being in Parchment and Paper; and therefore amended.

Prescrip-

Ante Page 201

Prescription for a Pew in a Church, by Reason of his House; Affidavits made that he was no Inhabitant there, nor is an Inhabitant: Not sufficient, for Possession only is enough without living there.

If one employs another to manage Business for him, tho' no sworn Attorney, the Party himself cannot take Advantage of it.

Raym. 34.

Holt: There ought to be no Plea to the Jurisdiction of the Court after Imparlance, but the Practice has been only to make it a *Respondeas ouster*. A special Imparlance admits the Jurisdiction of the Court, tho' it has been otherwise used.

Anonymus.

Prohibition to
Spiritual Court
quoad answer-
ing on Oath
in a Suit for A-
dultery.

MOVED for a Prohibition to the Ecclesiastical Court, in Case of Adultery, because they obliged the Party to answer on Oath; and Prohibition was granted *quoad* that, that he should not Answer on Oath, but proceed as to the rest; then it was moved, that there was a 'Temporal Penalty for providing for Bastard Children. But *Cur'*, We will not grant it, because Ecclesiastical Court proceeds only to the Punishment of the Crime of Adultery.

After Rule entered, Judgment shall be signed on the eighth Day after inclusively, in *Hillary* and *Trinity* Term.

Witnesses.

Where several Defendants be in an Information, and some of them have not pleaded, the Attorney General may enter a *Non pross* as to them, and they are good Witnesses.

If Plaintiff give Rules for signing Judgment, and Rules are out, and no Judgment signed before Essoin-Day of next Term, the Plaintiff must give new Rules.

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Term. Sanct. Trin.

Anno 5 W. & M. 1693.

Wharton versus Lisle.

TROVER and Conversion of several Loads of Flax; on *Non culp'* pleaded, the Jury found the Plaintiff Impropiator of a Rectory, and the Defendant Vicar of the same; and that about eight Years since, Flax was first sown within the Parish; for the first Year the Parson had 'Tithes of it, for the last seven the Vicar had constantly taken them; they find, that there were 660 Acres sown with Corn, and twenty-six only with Flax; that the Vicar was indowed with small Tithes; and if Flax were great or small Tithes, was the Question. *Holt*: 'The best Way to distinguish Tithes is the Place where they grow and are sown; for sown in a Garden, they are small Tithes; if sown in a Field great: And this Rule extends to Corn, Hops, &c. But *Eyres*, *Dolbin*, and *Gregory*, the Place not material, but we should only consider the Nature of the Thing; if Corn be sown in a Garden, Parson shall have it; if Flax in a Field, the Vicar; but if the greatest Part of the Parish be sown with small Tithes, the Parson; for otherwise the principal Part would be transferred to the Vicar; as *Dolbin* and *Gregory*: But *Eyres* said, in that Case he should not have them, unless by Usage. *Eyres* took a Difference, which was not denied, as to Tithes of Hemp, Raygrafs, &c. if they are sowed for Seed, Parson shall have them, as of Grain; if mowed, as Hay, Vicar shall have them, as of Herbs.

4 Mod. 183.
Comb. 201.
Carth. 263.
Tithes of Flax
are small
Tithes where-
ever sown;
per three
Judges con-
tra *Holt*.

1 Sid. 443.
Tithe Hops
are small, 447.

Harcourt and Fox.

4 Mod. 167.
Caf. in Parl.
158.
1 Sho. 426.
Comb. 207.
Clerk of the
Peace not re-
moveable by
a succeeding
Custos Rotulo-
rum; but has
a Freehold in
his Office.
Ante Page 13.
Postea Trin.
10 W. 3.
Saunders and
Owen.

INDEB' *assump'* and *non assump'* pleaded; the Jury found the Stat. of 27 H. 8. and *primo W. & M.* and the several Clauses in them about Clerk of the Peace; that the Earl of *Clare* was *Custos Rotulorum* of *Middlesex*, and that he named the Plaintiff to be Clerk of the Peace, to exercise the Office by him or his sufficient Deputy, *quamdiu se bene gesserit*; that the Plaintiff was capable of the Office, and duly admitted; that Earl of *Clare* was afterwards removed, and Earl of *Bedford* made *Custos Rotulorum*; who constituted by Writing under Hand and Seal the Defendant, during the Time he was *Custos Rotulorum*, *quamdiu* the Defendant *se bene gesserit*: And on solemn Argument, Judgment *pro Quer'*.

Eyres: The Plaintiff continues Clerk of the Peace notwithstanding Earl of *C.*'s Removal; but if the Plaintiff's Title was not good, he shall not take Advantage of the Limitation of Defendant's Title, tho' that be bad; *quod Dolbin* agreed: What this Office formerly was cannot be collected; but from 27 H. 8. this Act was declaratory, and the Thing designed was, that the Office should be executed by able Persons, and be under the Power of the *Custos*; that Statute not well providing this, 1 W. & M. was made to take him out of the Power of the *Custos*, and put him under the Power of the Sessions; and therefore this Statute has several Restrictions more than the other; the Words of this Statute plainly give him an Estate for Life, *quamdiu se bene gess'*; and this is an enacting Clause, and excludes the Limitation by the former Statute, for *expressio unius est exclusio alterius*; it is penn'd in an Affirmative, which does always imply a Negative. *Gregory* and *Dolbin* of the same Opinion; and they said, that the Words (that the *Custos Rotulorum* should nominate Clerk of the Peace, where he found the Place void) plainly shews that he does not depend on the *Custos*. *Holt* of same Opinion; it is to be considered who this Officer was; and it is plain the *Custos Rotulorum* is no Officer Time immemorial; because the Commission of the Peace, to which it relates, is not so; for Justices of Peace were not made till *Ed. III.*'s Time, in lieu of Conservators; and the Statute that gives them compleat Power is the 34 *Ed. 3. c. 1.* And legally, even to this Day, they have the Power of the Records; but be-
cause

cause of Inconvenience that might happen, it was in the Power of the King to name a particular Person for keeping the Rolls; and therefore all Writs of Error and *Certiorari* are directed to the Justices, but actually the Records are in the Custody of the *Custos*, and he liable to answer all Losses to King and Subject respectively; whence it is plain, no Person could be *Custos Rotulorum* without being Justice of the Peace. It was incident to the Office of Lord Chancellor, in the Name and Stile of the King, to nominate the *Custos Rotulorum* without Warrant or Bill signed from the King, as he does at this Day in all ordinary Administration of Justice; as Oyer and Terminer, Gaol-delivery, &c. Then comes the Statute of 37 H. 8. and thereby provided, that he shall be nominated by Bill signed; but because of Inconveniences, comes the 3 & 4 Ed. 6. and restores it again to Lord Chancellor, without Bill signed. Then comes this Statute of 1 W. & M. concerning the Nomination of Clerk of the Peace, who by Import of the Words has an Estate for Life; of which there had been no Doubt, if the Word (*only*) had been left out: This Act commits the Power of the *Custos* without respect to his Interest, and only as to his Possession; and the *Custos* having executed the Power, by putting in the Clerk of the Peace, the Clerk is now in by the Statute and the Limitation of it. In this Statute the Words of 37 H. 8. viz. *as long as the Custos Rotulorum shall continue*, are left out, and the Words, *as long as Clerk of the Peace shall demean himself well*, are put in. As to the *Custos Rotulorum*, the Statute of 37 H. 8. is revived, but not also Clerk of the Peace; if they had intended it should have gone with the *Custos Rotulorum*, there need not have been any Clause put in. The Design was to put the Clerk of the Peace under the Power of the Justices, who could not displace him before. This Statute has made several Alterations, and the Parliament intended to make a Provision, that the Sessions should be always furnished with a good Clerk; and that he might have Incouragement if he executed his Office well, gave him so large an Estate; and so prevent the Inconveniencies which may happen by Imbezilment of the Rolls, &c. when the Clerk is so often removed, and the Place held precariously. *Jud' pro Quer'*; and it was after affirmed in Parliament. *Vide postea Trin. 10 W. 3. Saunders and Owen.*

Per Holt: Executor may justify Payment of a Statute, when a Judgment is suspended by Writ of Error.

Masters

Vide Yel. 29.
Postea Mich.
5 W. & M.
Anonymus.

Masters and Marriot.

WHERE a special Request in an *Assumpsit* should be alledged, and is not, it is fatal on Demurrer, but help'd after Verdict.

Where a certain Person is mentioned, as if it were if *J. S.* pay so much Money, &c. no Notice is necessary; but if it be, as any Body should pay, which is uncertain, there must be Notice.

If a Justice of Peace records a Force on View, you shall not aver against it.

Per Sir Sam. Astree, *Solvit ad diem* is no general Issue; but because it is an ordinary Plea, the Clerk does non make up a Paper-Book of it.

Lamb versus Archer.

¹ Salk. 225.
Carth. 266.
Skin. 340.
Term limited
to *A.* and the
Heirs of his
Body, and if
he die with-
out Issue, li-
ving *B.* then
to *B.* it is
a good Limi-
tation.

Vide 3 Lev.
23.

Special Verdict, that *J. B.* was possessed of a Term for Years, and had Issue two Sons, *R.* and *J.* by his Wife *E.* and devises to *R.* after the Widowhood of his Wife *E.* during the Remainder of the Term of Years which I have to come in Tail Male; and for Want of such Issue as aforesaid, then he gives to *J.* as aforesaid; the Contingency has happen'd; and the whole Court held it a good Limitation; for there is no Danger of a Perpetuity, because the Contingency was to happen within a Life: The Words (*Heirs Males of his Body*) in the Limitation are void, but subsequent Words are good; and the later Words will restrain the former, and make them good; and this differs from *Gibbons* and *Somers*, *Hill.* 33 & 34 *Car.* 2. 2 *Roll. Abr.* 635. for there the Dying without Issue was indefinite; and *Child* and *Baily's* Case has been often shaken, and almost destroyed by subsequent Resolutions.

D E

Term. Sanct. Mich.

Anno 5 W. & M. 1693.

Anonymus.

Wherever Costs are adjudged *de incremento*, it ought to be *eidem quer' ex assensu suo*, adjudged.
 2 Saund. 107.

If Action be brought against Administrator, by Name of Executor, he cannot plead in Bar *ne unques Executor*, and give in Evidence he was Administrator, because he allows himself to be suable. Vide the next Page, Harding and Salkill.

If there be a joint Declaration against two, and Attorney appears for one of them, and takes a joint Declaration, this does not imply an Appearance for the other.

No Declaration shall be entered after the second Term, tho' a *Nolle prosequi* be not enter'd, which may be enter'd in the Vacation after the second Term, as of the second Term, *quia non comparuit infra terminum*.

Midgleys versus Lovelace.

Assignee of a Reversion; and Assignee of a Term; Assignee of a Reversion granted over his Reversion, and after brought Covenant against Assignee of the Term, for Rent arrear before the Grant of Reversion; and on Demurrer *tota Curia*, If at Common Law the Assignee of a Reversion had granted it over, yet he might after have an Action Assignee of a Reversion may bring Covenant for Arrears of Rent due before he granted the Reversion over.

N

Action

Action of Debt for Rent; tho' he could not distrain or have Waste, because his Power over the Land was determined. It is true, where a Man seis'd of a Rent in Fee, grants it over, there he has no Remedy for the Arrear; because the Distress, which was his only one, is gone by the Assignment; but where Rent is reserved upon a Lease for Years, it is otherwise, because Debt lies on the Contract; and here Assignee shall have it as a Fruit fallen from the Reversion. *Jud' pro Quer'.*

Harding versus Salkill.

Administrator
and not Exe-
cutor pleaded
in Bar, ill.
Ante p. 45.
Comb. 220.
Vide postea
Mich. 7 W. 3.
Bowers & Ux'
v. Coke.

DEBT against Defendant as Executor to one M. Defendant pleaded, that M. died Intestate, and Administration was granted to him; Plaintiff demurred; and it was said to be a good Plea; for if he be Administrator, he is not chargeable as Executor, or *è converso*; and so is *Dy. 305. b. sed non allocatur*, for that Case is not Law; and rather an Evidence to charge the Defendant than discharge; this might have been well pleaded in Abatement, but it is no Plea in Bar: And *per Holt*, if an Action be brought against an Administrator, by the Name of Executor, and Judgment against him, and afterwards another Action is brought by the Name of Administrator, he may plead the former Judgment in Bar, *ultra quod, &c.* and Judgment for Plaintiff.

Master, Warden and Company of Cutlers in Highamshire versus Buskin.

DEBT on a By-Law for 40s. Penalty, that a Cutler shall keep no more than one Apprentice; Breach assigned, that Defendant *duas personas ut Apprenticios cepit & custodivit*, and so did not say that they were Apprentices. But *Cur' econtra*; for the Design of the Company was in this By-Law to hinder any Member from qualifying more than one at a Time; but if he had taken one to live with him in the Exercise of the Trade for seven Years, this is a sufficient Qualification, tho' Party is never bound as an Apprentice; and he shall have equal Privileges with one bound.

Where Action
brought for a

Sum certain, as a Penalty, shall have Costs; but *per Holt*, where 'tis to the Party grieved; *aliter* to a common Informer.

brought for a Sum certain of 40 s. as a Penalty. *Vide Cro. Car.* 559, 560. And *per Cur'*, that is a settled Case, and Costs awarded, but with this Difference put by *Holt*, where the Action is brought by Party grieved, and Penalty certain, he shall have Costs, because Defendant ought to have paid it without Suit; and when Penalty is given to Party grieved, it is certain to whom Payment ought to be made; but where brought by a common Informer, he shall not; for he is altogether incertain, and has no Title to Money till he brings his Action, and it is that vests an Interest in him. 1 Vent. 133.

Colethirst versus Wiseman.

ERROR of a Judgment in Case in the Inferior Court of *Hull*; Error assigned was, that *Capias* was the first Process, *Tilw.* 158. But *per Cur'*, that Case is not Law, and so it has been often ruled; for it is but a Misconveyance of Process, and help'd by Appearance. Judgment affirmed.

Vide Sir T. Jones 165. *Capias* was the first Process in Inferior Court, cured by Appearance. 1 Inst. 325. a.

Badgerly versus Wood.

PROHIBITION to Spiritual Court for Tithe Pigeons, on Suggestion that they were spent in the House. *Holt* doubted.

Tithe of Pigeons spent in the House not due.

Rex & Regina versus Wright.

INDICTMENT for Forestalling *centum & octoginta aves, Anglice* Turkeys; moved in Arrest of Judgment, that it was uncertain, and could not be supplied with an *Anglice*. *Stile* 313. *Noy* 68. But *Cur' contra*, on the Authority of *Hardress* 361. which was a Case in Point.

For Forestalling *aves, Anglice* Turkeys, good.

Jones versus Episcopum Landaffe.

PROHIBITION granted to Spiritual Court, because the Bishop articted against his Chancellor for Insufficiency and other Misdemeanors, and prayed that he might be deprived; which they have no Power to do; and they denied *Sutton's Case*, 1 *Cro.* 64. to be Law.

Prohibition to Spiritual Court on Suit there to deprive a Chancellor.

Rex

Rex versus Hebbard.

Trespafs, Af-
fault and Bat-
tery, if De-
fendant in
Plea varies
from the Time,
must aver *quæ*
est eadem
transgressio.

HOLT; in Trespafs, Assault and Battery, if Defendant in his Plea varies from the Time alledged, he must aver *quæ est eadem transgressio*; but where he agrees in the Time, he need not.

Anonymus.

Debt on a
Judgment;
Plea, Writ of
Error depend-
ing in Exche-
quer Cham-
ber, ill.

Ante p. 43.

DEBT on Judgment in this Court; he pleads in Abatement *quod adhuc respondere non debet*, because of a Writ of Error depending in *Cam' Scacc'*; Plaintiff demurred, and it was argued for Plaintiff, that Action lay; for if it would not lie before Affirmance, it would be to no Purpose that Action of Debt might be brought on a Judgment; for after Affirmance Plaintiff may sue Execution; and no Man that can sue Execution, will be at the Trouble of bringing Action of Debt. 1 *Sid.* 236. is a Case in Point; and the Difference there between a Writ of Error of a Judgment in King's Bench, and such a Writ of Error as this, had no Foundation in Law; *quod Holt concessit*, for Debt will lie in Common Pleas upon a Judgment there, after Error in *B. R.* as well as on a Judgment here, after Writ of Error in *Cam' Scacc'*. *Holt*: It is strange, that a Writ of Error should supersede an Execution by one mean, and yet allow a Man to come at it by another; there was no Remedy at Common Law for Debt or Damages, when a Year had pass'd after Judgment, but by Action of Debt; till the Statute of *W. 2.* gave a *Sci' fac'* after the Year; and it is resolved *Yelv. 29.* that an Executor could not plead a Judgment against his Testator, after Error brought in Bar of a *Sci' fac'* upon a Statute; because it was doubtful whether it should be affirmed or not: But I will be bound by constant Resolutions of this Court, which are, that this is no Plea in Bar or Abatement; it is true, there have been some Resolutions to the contrary in the Exchequer Chamber, and Judgments have been reversed there in my Lord *North's* Time for this Error; and in Chief Baron *Turner's* Time, and particularly in the Case of *Danvers* and *Smith*; but that was a new Notion. *Dolbin* and *Eyres acc'*, (*absente Gregory.*) *Eyres* cited *Mod. 121.* and they all agreed there was no Difference between it's being pleaded in Abatement and in Bar; and so in the eighth *W. 3. per totam Curiam.*

D E

Term. Sanct. Hill.

Anno 5 W. & M. 1693.

Benson and Scott.

Ejectment; Special Verdict, that *Scott* was feis'd of Copyhold Lands in Fee, according to Custom of Manor, and surrendered to the Use of *M. Collard*, upon Condition that on Payment, &c. the Surrender should be void; the Condition is presented broken; *Scott* dies; *M. C.* is admitted, who surrenders to Lessor of Plaintiff, who was Heir to *Scott*: They find the Custom within this Manor, that the Wife of a Copyholder shall have her Frank-bank of the Copyhold Lands of which her Husband died feis'd; and that after the Death of *Scott*, the Defendant being Relict enter'd, and was admitted according to the Custom, and continues yet a Widow; and *per tot' Cur'*, the Admittance of *M. C.* shall avoid the Frank-bank, to which otherwise the Wife is intitled; for tho' the Lessor of Plaintiff be found to be Heir, yet that does not alter the Case, for he comes in as Purchaser, and is in of her Estate: And the Frank-bank is not inchoate by Marriage, like Dower; for if it were, a Lease or Alienation in the Husband's Life would not bind it as it does, but it depends purely on the Dying feis'd; but this was defeasible by Admittance of the Surrenderee; and when that comes, the Frank-bank must fall with the Estate out of which it is extracted.

Per Holt: The whole Hundred where the Place is, is the Vicinetus thereof.

Whole Hundred is the Visne.

O

At

Vide 1 Cro.
340, 448,
449.
4 Inst. 164.

At the Quarter-Sessions, there may be a Trial the same Sessions if there be an Adjournment; so as there may be fifteen Days between the *Teste* and Return.

Batterson and Goodwin.

Plea that Indorsee was a Bankrupt at the Time of Indorsement, but must plead that a Commission was taken out.

ACTION *sur* Case by an Indorsee against the first Drawer of a Bill of Exchange; Defendant pleaded that Indorser, at the Time of Indorsement, was a Bankrupt; Demurrer. *Per Cur'*, this is a good Plea in Bar, for a Bankrupt is disabled to assign a Bill; but then he ought to have pleaded a Commission taken out; wherefore *Jud' pro Quer'*.

Hibbord and Coulthrop.

Assumpsit pro opere & labore, not saying what, good.

IN *Assumpsit*, the Error assigned was, that it was *pro opere & labore*; without shewing what. *Sed non allocatur*, for it is enough to shew that it was upon a simple Contract, upon which this *Assumpsit* can arise; and the Court will not intend it to be an illegal Consideration. 1 Mod. 8.

I

D E

Term. Paschæ,

Anno 6 W. & M. 1694.

Rex and Tucker.

ERROR to reverse an Attainder of High Treason, in which there were two Exceptions taken; 1. The Omission of Amputation of Secrets. 2. Of *contra Ligeantiae suæ debitum*, in the Conclusion of the Indictment. *Holt* and *Eyres* held, that the Cutting out of the Members was not a fatal Fault; for tho' it be Part of the Judgment, yet it is not found in any Precedent before 12 *Car. 2.* and therefore if we should reverse it, on this Account, it would let in a great Confusion on Mens Inheritances, who purchased under Attainders: But *S. Eyres* in this would give no Opinion. *Sed per totam Cur'*, the other, of *Ligeantiae suæ debitum*, is fatal; tho' a few Records were shewn where they were omitted, as the Record mentioned in *Bensted's Case*, 1 *Cr. 583.* *Sir H. Vane* and *Lambert*, 14 *Car. 2.* *Cotton* and *Messenger*, 20 *Car. 2.* *S. Eyres*: These Words are necessary in the Conclusion of the Indictment; because he who owes no Allegiance is not indictable; as an Alien Enemy, 7 *Co. 6. b.* 3 *Inst. 11.* 1 *Inst. 129.* *Dyer* 144. *Hob. 271.* *G. Eyres*, accord', Every Indictment ought to contain sufficient Form and Matter, and an apt Conclusion; and as to the two first of these, and that the Fullness and Certainty cannot be supplied by Argument or Implication, he cited 2 *Cro. 20.* 3 *Cro. 93.* 5 *Co. 121.* And to the apt Conclusions, and without them they are erroneous, he cited 2 *Cro. 527.* 2 *Rol. Abr. 82.* where *contra Pacem* is held a necessary Conclusion on Indictment, and *contra formam Stat'* has been held necessary upon Indictment

4 Mod 162.

3 Lev. 396.

Com. 259.

Skin. 338,

360, 425, 442.

Carth. 317.

Indictment for

Treason, not

saying *contra**Ligeantiae suæ**debitum.*

ment on a Statute, and Want of them Error. 2 Cr. 142. And no Words will supply this.

Holt acc', An Alien Enemy cannot commit Treason, and therefore these Words are necessary, and cannot be supplied by any other Words, no not by *debitum Ligeantiae minime ponderans*; because he may not well consider Allegiance, and yet not act against it; nor by the Words *contra dominum Regem verum & indubitatum Dominum suum*, because these are not Words of Necessity, but put in lately; for in former Times were only *contra Dominum Regem*. 1 Cro. 120, 122. And Words unnecessary shall never supply Words necessary and requisite; but I do not think these Word necessary in the Conclusion, but ought to be averred some where: I have seen several Precedents have them in the Beginning. *Contra naturalem dominum* will not supply it; and the Omission of *contra Pacem* is Error, tho' Breach of Peace appears plainly in the Indictment. *Sam. Eyres* delivered *Gregory's* Opinion to be the same.

Goodright versus Cornish.

Salk. 226.
4 Mod. 255.
Skin. 408.
Com. 254.
Devise for
fifty Years to
A. if A. should
so long live,
and after to
the Heirs
Male of A.
and for De-
fault of such
Issue, to B. in
Tail, the Re-
mainder to
the Heirs of
the Body of
A. is void,
there being
no Freehold
to support it,
and the Re-
mainder to
B. takes Effect
presently.
Vide postea
Pasch. 11 W.
3. Scatter-
good v. Edges.
Ante p. 39.

Ejectment; Special Verdict, that in the Year 1663. one *Knowling*, seisd of Lands in Fee, had Issue three Sons, *J. K.* and *R.* and on the 27th of *March* made his Will, and devised his Lands to his Son *J.* for fifty Years, if the said *J.* should so long live; and after the Determination of the said Term, then to the Heirs Males of the said *J.* and for Default of such Issue to *K.* in Tail, the Remainder to *Robert* the third Son in Tail Male; Remainder to right Heirs of the Devisor. They find, that the Devisor died seisd; that *J.* the Son entered, and the third of King and Queen he suffered a Common Recovery, as Tenant to the *Præcipe*, brought by one *J. R.* that the Recovery was to the Use of himself for Life, and after his Death, to his first and every other Issue; and for Default of Issue of his Body, to the Defendant in Fee: They find, that *J.* the Son died seisd without Issue; the Defendant enter'd, and that *K.* the second Son died leaving *J. K.* the Lessor of the Plaintiff. And *per Cur'*, *J.* had no Estate-tail, and the Recovery did not bind *R.* who had good Title. *Holt* relied on 2 *Leon.* 70. and said, that if the Words (*if the eldest Son die without Issue*) in that Case, would not make an Estate-tail, by Implication, in the eldest Son; *a fortiori* the Words

in

in this Case shall not, there being a Term for Years expressly given, which shall not be drown'd by Implication of Law. And he likewise said, that Remainder limited by the Devise to the Heirs of the Body of J. was void, having no Freehold to support it; and that *per verba de presenti* one could not devise an Estate to the Heir of one living, but *per verba de futuro* one may, viz. to the Heirs of J. S. after the Death of J. S. and this shall enure as an executory Devise; and so *Windham* held in the Case of *Snow* and *Cutler*, where he held a Devise to an Infant *in Ventre sa mere* good *per verba de futuro*, viz. take after he was born, otherwise *per verba de presenti*; and the Remainder limited to the Heirs of the Body of J. being void, the next Remainder limited to K. must take Effect presently. That this was not an executory Devise to the Heir of the Body of J. it being limited expressly as a Remainder; but admitting it were so, yet it could vest no Estate in J. and he dying without Issue, the Estate devised to the Heir of his Body, tho' it did take Effect as an executory Devise, must be void.

Reeve versus Long.

ERROR *in communi Banco* in Ejectment; Special Verdict, J. Long seis'd in Fee had three Brothers, A. B. and C. and devises these Lands to A. for Life, Remainder to the first Son of A. in Tail Male, and so to the second and third Sons; and for Default of such Issue, to B. for Life, and to his first, second Son, &c. in like Manner; Devisor dies; A. being unmarried; A. marries and dies without Issue born, but Wife was *privement ensient* with a Son, who is born after: Judgment in the Common Bench was, that the posthumous Son had no Title; and it was affirmed here: And they held, that a Remainder to the first Son of A. was a contingent Remainder, and so must take Effect according to the Rule in *Archer's Case*; but at the Time of the Death of A. there was a Default of Issue Male, on which the Estate vested in the Possession of B. and shall not be removed against the Birth of a Son after. And this is no executory Devise upon the Rule laid down in 2 *Saund.* 388. Where a contingent Estate is limited to depend on a Freehold, capable to support the Remainder, it shall never be construed an executory Devise. This Judgment was reversed in the House of Lords.

3 Lev. 408.

4 Mod. 259.
cited.

4 Mod. 282.

Carth. 309.

Salk. 227.

Skin. 430.

Vide 10 & 11

W. 3. c. 16.

Provision for

posthumous

Children.

If Writ be returnable here, tho' it issues out of Chancery, this Court may compel the Sheriff to return the Writ.

If a whole Term intervenes, there may be Execution against the Bail, notwithstanding a Writ of Error in Parliament.

D E

Term. Sanct. Trin.

Anno 6 W. & M. 1694.

Comes versus Hund' de Bradley.

4 Mod. 303.
Salk. 613.
A Servant
robb'd of his
Master's Mo-
ney may sue
on the Statute
of Hue and
Cry, and can-
not release.

ACTION upon the Statute of Hue and Cry, by a Servant who was robbed of his Master's Money: And *Levinz* argued that he should not; for by that Means he might prejudice his Master, by Releasing the Action; and took a Difference between a Servant, and a common Carrier, and a Sheriff; for the two last have a special Property, and may have Trover; but *per Cur'*, he shall not release, and 1 *Brownl.* 155. is a full Authority.

Count of Arran and Crisp.

Covenant to
pay Taxes ge-
nerally, in-
cludes Par-
liamentary
Taxes.

THE Plaintiff made a Lease to Defendant in 1675. reserving such a Rent; and Defendant did covenant to pay the said Rent clear of all Taxes and Assessments whatsoever imposed, or to be imposed, and gave Bond for Performance of Covenants; and in Debt on this Bond, after Oyer,

Oyer, Defendant pleads Conditions performed; Plaintiff replies the Lease and Covenants, and assigns for Breach, the Defendant's not paying two Years Rent at *Lady-Day* last; Defendant rejoins, and says he paid so much in Money, and so much in Taxes, payable by the Act of 4 s. Aid *per* Pound, amounting in all to the Rent due. Plaintiff demurs; the Question was, if this Covenant did extend to charge the Defendant with Parliamentary Taxes, because the Word (*Parliament*) not express'd in the Covenant; and *tota Cur'*, *nisi Holt*, clear of Opinion it did: But *per Holt*, Judgment ought to be for Plaintiff for a Fault in Pleading, tho' the Law as to the Matter be for the Defendant; for the Matter of this Rejoinder, being by Way of Excuse, ought to be set forth in the Bar; and as it is here set forth in the Rejoinder, it is a Departure; for where before he says he performed the Condition, now he says he is not obliged to it. *Jud' pro Quer'*.

Departure. 1
Inst. 304. a.
1 Lev. 81.

King and Queen against Knowles.

Charles Knowles was indicted for a Murder, and the Indictment was removed into the King's Bench by *Certiorari*, and the Defendant brought to the Bar by *Habeas Corpus*; and he pleaded in Abatement to the Indictment, that King Charles, the second Year of his Reign, did by Letters Patent produced now in Court create William, then Viscount Wallingford, Earl of Banbury, and granted the Honour to him and Heirs Males of his Body; that William Earl of Banbury died seisd of this Honour; and that it descended to Edward Knowles, Son and Heir of the said William; That Edward dying without Issue, it descended to Nicholas K. his Brother and Heir, and Son and Heir Male of the Body of William; and that Nicholas died, leaving Issue and Heir of his Body C. the Defendant; by Virtue of which Patents and Descents he became Earl of Banbury; and because he is not named Earl of Banbury in the Indictment, he prays Judgment if he shall be put to Answer. The Attorney General, protesting that no Part of the said Plea is true, replies, that on the 13th of December 4 W. & M. the Defendant preferred a Petition to the Lords Spiritual and Temporal in Parliament assembled, in which, alledging that he was a Peer of this Realm, he desired that he might be tried by his Peers; and upon this *taliter processum fuit secundum Legem & consuetudinem Parliamenti*: Yet it was resolved, considered

Salk. 509.
Skin. 517.
Comb. 273.
On Indictment
for Murder
by the Name
of C. K. he
pleaded in A-
batement Mis-
nomer, that
he was Earl
of Banbury,
and held a
good Plea.

considered and ordered by the Lords, &c. that he had no Hereditary Right to the Earldom of *Banbury*; and that his Petition should be dismissed; and to this Replication the Defendant demurs.

Sam. Eyres: This Order of the House of Lords does not bar the Defendant of his Peerage, nor conclude the Court from examining the Force and Effect of the Order.

B. R. to judge of the Validity of all Records and Judgments pleaded there.

1. All Misnomers here pleaded are within the Jurisdiction of this Court; and in such a Plea, the Court may judge whether the Party that so pleads be a Peer, or hath a Title to Peerage, or no. 2. That this Court shall judge of the Validity of all Judgments and Records here pleaded, and whether they are legal and effectual or no; as of an Act of Parliament, what is one; that an Act by King and Lords is not a good one; and so they may judge of an Order of the House of Lords, whether the Concurrence of the other Estates of Parliament, or one of them, be requisite; so the Court may take judicial Knowledge of the Proceedings in Parliament, and of their Committees, 1 *Saund.* 133. *Lake and King*. As to the Objection, that the Defendant hath, by his Demurring, confess'd this to be a Judgment *secundum Legem & consuet' Parliamenti*; this is Matter of Law arising thereon; and Demurrer confesses only Matter of Fact, as stated, and leaves the Matter of Law arising thereon to the Judgment of the Court. *Plow.* 85. As to the Order of the House of Lords, all the Books are, that a Peer cannot be degraded but by Attainder, or by Act of Parliament. 4 *Inst.* 355. *Cotton's Rec.* 702. 12 *Co.* 107. Nor can he by Fine devert himself of his Honour; as adjudged in Lord *Parbeck's* Case; because the King and Kingdom are interested in his Honour, and therefore it cannot be taken away without their Consent. Where there has been a Contest to whom an Honour descended, upon Petition to the King, it has been referred to the Lords, and by them examined, and their Opinions reported to the King, as in my Lord of *Oxford's* Case. *Jo.* 97. So in the Case of a Contest about Precedency. 11 *Co.* 1. and it is a great Reason that the King, who creates all Peers, should be Party to their Deprivation. To the Plea it is sufficient, without averring *Banbury* to be in *England*; for the Creation being by Letters Patent under the Great Seal of *England*, he shall be intended an *English* Peer; for it is the Letters Patent, and not the Title, that makes an *English* Peer; and therefore the Title may be taken from a foreign Place, as Earl of *Angus*, Duke of *Albemarle*: And as to the Objection to the Conclusion of the

Peer cannot be degraded but by Attainder, or Act of Parliament.

Plea, where it is said, & *hoc paratus est verificare*, without saying *per Recordum*, and without a Writ to certify his Peerage, that is well enough. Trial by Writ must be appropriated to Peers created by Writ; but Peerage by Patents appears by the Patents themselves. Where my Lord Coke 6th Book says, that Baron or not Baron is tried *per* ^{9 Co. 31.} Record, he says Baroness by Marriage, being Matter of ^{Postea p. 61.} Fact, is triable by Jury; and so are the Descents in this Case; the Patents produced are good Evidence of the first Creation; but the Plea, consisting of Matters of Fact, had been ill if it had concluded to the Record; but as it is the Defendant's Plea is good, and Replication ill; and therefore Indictment ought to be quashed.

Giles Eyres acc' to the last Point *in terminis*; for the Patents produced have verified the first Creation of his Peerage, for the Patents are a compleat Creation without more. 12 Co. 107. 1 *Inst.* 16. *Noy* 150. When a Patent is pleaded and produced in Court, *Nul tiel record* cannot be pleaded to it; the Descents pleaded are Matters of Fact, and Nobility gain'd by Matter of Fact is triable by the Country; and Case is the same if gained by Descent; there is no Necessity of having a Writ out of Chancery to certify whether one be a Peer by Descent; and none of the Cases at the Bar, for that, is applicable to this, for they are all Writs of Privilege and Exemption. As to the second Objection, that *Banbury* is not an *English* Town, he held as before, and said, that an *Irish* Peer may be created under the Great Seal of *England*, but then there must be special and exprefs Words, *viz.* an Earl in *Regno Hibernia*. *Seld. Tit. Hon.* 696. The Reason of a certain Place from whence to take the Title, was to make an Estate-tail within the Statute of *Donis*, which extends only to Limitations which concern Lands and Tenements; and therefore without naming some Place, a Limitation of an Honour to one, and the Heirs Males of his Body, would be a Fee-simple conditional at Common Law; and if so, would be forfeited by Attainder of Felony, as an Estate-tail of a Baronetship, which is not created of any Place. 12 Co. 81. 3. The Defendant need not aver that he is *unus parum Angliæ*, for the Pleading of the Patents and Descents shew that sufficiently; but a Bishop, who is a Peer *ratione tenuræ jure Episcopatus*, must plead he is *unus parum Angliæ*, he having no Patent to produce. As to the Replication, he held, that does not avoid the Plea; for the Order of the House of Lords is no Judgment nor Bar to Defendant; for Peerage cannot be taken away, but by Attainder

Descents are
Matter of
Fact.

Bishop having
no Patent to
produce, must
plead he is
unus parum
Angliæ; not
so of a Lord.

Peerage cannot be revoked.

1 Inst. 16. b.

1 Inst. 9. b.
Writ gives a Fee in the Honour, but in Letters Patent it must be limited by apt Words.

Earl is a Publick Officer.

The Lords have Power as to Precedency there, but not over the Estates of the Members.
Show. Parl. Caf. 1.
Contra resolved in the Lords.

Keyl. 56.

der or Act of Parliament, or by *Scire fac'* (where created by Letters Patent) to repeal those Patents; for the King cannot revoke them because it is a Common Law Conveyance, and thereby an Interest is vested and settled in the Patentee. A Writ indeed may be superseded before an actual Sitting of Parliament; but otherwise of an Honour created by Patents. A Writ gives a Fee in the Honour without express Words; but in Case of Letters Patent, the Estate in the Honour must be limited by apt Words, or else it is void; it may be intailed, and must descend according to the Intent of the Common Law, and was forfeited for Treason before the Statute of 26 H. 8. 7 Co. 34. As to the Order; every Vote of Lords is not a Judgment; the Defendant's Petition cannot give the Lords a Jurisdiction, if they had none before; but upon Petition to the King, and Reference to the Lords; and this has been the Course used in my Lord *Delaware's*, *Oxford's Abergavenney's*, *Purbeck's* and *Fitzwater's* Cases; and this Course is most reasonable, that the King being the Fountain of Honour, as Nobility cannot be created without him, so it shall not be determined without his Consent in Parliament. An Earl is a Publick Officer in Time of War and Peace, and the King and Subjects have an Interest in him. 7 Co. 34. 12 Co. 28. 4 Inst. 126. The King, by his Prerogative, having Election of any of his Courts to try his Cause, he may by Indorsement of such Petition refer the Trial of it to any Court, and thereby gives the Court a Jurisdiction of it. There is no Precedent, where the Lords exercised a Jurisdiction to determine the Right of Peerage, without such Reference. The Lords have a Jurisdiction over their Members, as to their Sitting in Parliament, and Precedency there; but not over their Members Estates and Inheritances in their Honours, but they are to be determin'd by Common Law. Their Order does not bind the Liberty of the Subject; as 2 Inst. 47. about sending able Lawyers into *Ireland*. Inferior Courts are not tied up from judging their Proceeding void; as if a Writ of Error be brought in Parliament, of a Judgment in Common Bench, whereas it should have been in the King's Bench, the Common Bench may adjudge the Writ of Error void, and no *Supersedeas*, and may award Execution; or the King's Bench, notwithstanding this Error, may examine the Judgment upon Writ of Error. 3. As to the Demurrer, that confesses only Matter of Fact, and not of Law; & *Lex Parliamenti* is Matter of Law. As to the Precedents, they are Petitions, sitting the Parliament, for Trial. A Peer cannot wave his Trial

Trial by Peerage; 3 *Inst.* 30. but the King is not bound by their Order for a Trial; for he may choose whether he will appoint a High Steward. In the Lord *Preston's* Case, there was no Creation of Honour at all; it was not under the Great Seal of *England*, and the Setting it up was a Crime next to 'Treason. *Piercy's* Case concerned Precedency for a Place to sit in the House; and after several Trials and Translations below, and Depositions and Counsel heard there, he was declared an Impostor; and so concluded *pro Def.* *Gregory accord' in omnibus.*

Holt: The Plea is good, and Replication bad; by the Plea the Defendant has made a good Title to the Dignity in the Ancestor by Letters Patent, and by Descent to himself.

1. As to the Exception, that it does not appear that *Banbury* is an *English* Town, he said, an Earl created by Letters Patent under the Great Seal of *England*, shall be intended an *English* Peer, if not otherwise express'd; and to make this the clearer, he examined the Original and Antiquity of Earls. An Earldom formerly consisted of three Things, Dignity, Office and Revenue: As to the Dignity; Earl, what.

before *Ed. III.*'s Time there were only Earls and Barons; Barons were first created by Tenure, and afterwards by Writ; and since 11 *R. 2.* by Letters Patent Earls; were always created by Patents. *Seld. Tit. Hon.* 536, 8, 9. 2dly, Their

Office is of Trust for the Safety and Defence of the Realm; they are not called *Comites* from the County, but a *Societate Regia*, they assisted the King in War and Peace; and therefore an Earldom in Tail before 26 *H. 8.* was forfeited

for 'Treason, by a tacit Condition annexed in Law; because of the Breach of Trust and Confidence in the Party that was made Noble, and so *contra officii sui debitum.* 7 *Co.* 34.

3dly, Their Revenues were Castles, or other Profits annex'd to their Honours, and suitable for the Support of their Dignity; which was the Reason that by *Magna Charta* an

Earl's Heir was to pay a Relief of an Hundred Pounds, whatever was his Portion; and the Relief of an Earl and a Baron were settled at different Rates: But in Process of

Time, these Revenues annex'd to the Honour diminished; but while the Revenue was annexed *sub nomine & honore*,

the Relief continued the same; and therefore the Words are not *sub nomine & honore*, but *ad sustinendum nomen & onus.*

2 *Inst.* 9. 1 *Inst.* 88. b. So the Revenue not being annex'd, as formerly, Earls have not paid Relief *pro integro Comitatu*, but as other Persons, according to their Possessions; but the Place from whence an Earl is named, is but a titular

Postea Mich.
7 W. 3. Lord
and Lady
Gerrard.
9 Co. 49. a.

lar Distinction, and no Part of the Dignity: 'The Earldom is not confined to the Place, but extends through the whole Kingdom. 2dly, The Great Seal is proper and peculiar to *England*, and to no other Place; for by that Seal the King acts as King of *England* only, without Respect to any other Dominion. If before the Conquest of *Ireland*, one was created by *English* Letters Patent, and the Title was the Name of a Place in *Ireland*, he would certainly have been an *English* not an *Irish* Peer; and so it is now; for the Conquest of *Ireland* being an external Accident cannot alter the Construction of Patents and Laws of *England*. 'The Intendment, that *Banbury* is out of the Realm, is a foreign Construction; tho' the King by *English* Patent may create an Earl of *Ireland*, yet that must be by exprefs Words, because it is a special *Act of Prerogative*; for the Great Seal extends into *Ireland*, because subordinate, and subject by Conquest; and the King's Patents may be construed as Acts of Parliament, which extend not to *Ireland*, if it be not specially named. *Seld. Tit. Hon.* 696. In the Creation of Nobles, it is not mention'd in what County the Place is, from whence they take their Titles; which would be, if necessary that the Place should be in *England*: Many *English* Earls have Titles from foreign Parts; Sir *Richard Woodville* was created Earl of *Rivers*: There was an antient Family called *Rivers*, that were Earls of *Devon* in King *Ed. III.*'s Time, but there is no Place to be found of that Name. Since 21 *H.* 8. Patents of Earls have had these additional Words in them, that Patentee shall have *sedem & vocem in Parliament inter comites Angl'*, but the Earl of *Rivers*'s Patent has no such Words, or any other than are here pleaded by the Defendant. As to Defendant's not averring that he was *unus parium, &c.* an Earl in Pleading need not make that Averment; and 6 *Co.* 53. and 8 *H.* 6. 9. in which that is made, is in Case of Baron only. Baron indeed is an Addition; if created by Writ, it is no Part of the Name; if created by Patent, it is: But a Baron must not plead or be called only *Dominus*, but must say *Parliamenti*; for one may be called *Dominus*, as an Earl's Son, and not be a Lord of Parliament. Besides, the Defendant here does not claim a Privilege as a Peer, but pleads a Misnomer in the Omission of his Title, which being given him by Letters Patent is Part of his Name. Being a Peer, or Lord of Parliament, does not exempt him from being *indicted here*; and therefore not material in this Case. He that claims Benefit of Trial by Peers, must shew himself to be *unus parium, &c.* but this

Earl need not
aver that he is
unus parium
Angliae.

Baron created
by Patent is
Part of the
Name; not if
by Writ.

3 Inst. 26.

3 Inst. 30.

this Plea is no more than if a Knight had pleaded Misnomer, in not being named a Knight. As to producing a Writ to certify the Peerage, it is to be answered, that there be some Barons, and one Earl, so antient, that their Commencement cannot be shewn; such can no Way intitle themselves, but by Prescription; and such ought to produce a Writ, that some of their Ancestors sat in Parliament, and then derive a Title by Descent from such Ancestor to him that pleads it. In the 7 Co. 15. *Calvin's Case*, if compared with other Books, is no more than that it shall be testified by Record of Parliament, if the Party or his Ancestors sat as Peers in Parliament; which proves, that if any Ancestor appears on Record to have been a Peer, as here it doth by Letters Patent, it is sufficient; and that Title may be derived by Matter of Fact, as by Descent. The Writ intended is in Nature of a Writ of Privilege; if founded on Record, it testifies Matter of Record, and is conclusive; but if it certifies Matter of Fact, as it must do in such a Case as this, it is traversable, notwithstanding such Certificate, and therefore signifies nothing; and therefore if the Plea should conclude *& hoc paratus est verificare per Recordum*, it would be ill; for the only Matter traversable is Matter of Fact. A Writ to certify their Descents would be vain; for where a Writ certifies a Thing which lies as much in the Conu-
 sance of the Court to whom it is certified, as of the Court which certified it, it is needless. Upon pleading Creation of Peerage by Writ, such Writs are brought for Expedition, not Necessity, but to prevent the Delay which would be on a Traverse, and taking Issue on the Sitting of the Parliament, which Traverse cannot be after such Certificate: So if the Defendant, in his Plea, shew the Letters Patent that created the Honour, they cannot be traversed, or Issue taken on Earl or not Earl, except the Patent be denied, which cannot be, because it is produced; and these Patents are not like those of Lands, where *non concessit* may be maintain'd by Matter foreign; as that the Lands do not appear under the Description in the Letters Patent; or that there are divers Lands or Tenements of the same Name. As to the Replication, that does not conclude the Defendant. 1. Because the Order is no Judgment of Parliament. 2. The Plea pending does not concern the Title of his Earldom. 3. There is nothing in this Order to bar him from enjoying the Right and Title of Earl. 1st, It is no Judgment of Parliament: That Court consists of King, Lords and Com-
 R mons.

mons. *Crompt. Jurisd. of Courts* 1. 4 *Inst.* 1. *Dy.* 60. The Authority of the House of Lords is Legislative and Judicial. The Judicial Power is actually executed and administered by the Lords, but is legally and virtually in the King; if not, in the whole Parliament. All judicial Proceedings are either *coram Rege in Parlamento*, or *placita de Parlamento*, or *coram Rege & ejus concilio in Parlamento*. *Ryly's Pl. Parl.* f. 1, 114, 145, 157, 63, 66, 267, 292. Writs of Error are *coram nobis ad presens Parliamentum*: The Judgment *per Cur' Parliamenti*, and not *per Dominos Spirituales & Temporales*; and tho' the Journals are by Lords Spiritual and Temporal, yet they are only as Notes and Warrants for the Clerk to make up the Rolls by. *Hob.* 110. All Courts mention the King, either to give them Jurisdiction, or as Party to the Judgment, for all derive their Jurisdiction from him. The Lords then having double Capacity to act judicially, as the Court of Parliament, or to act as a particular House, we cannot know in which Capacity they act but by the Stile of their Orders; and if they act by the Stile of the Lords Spiritual and Temporal, they act as a distinct House, exclusive of the other Estates.

In the Court of King's Bench, which is holden *coram Rege*, the Judgment is not entered to be given *per Justiciarios*, tho' they actually give it, but it is said, *per Cur' Domini Regis*; and a Judgment given in another Form or Stile would be void; and tho' the Judges give it, yet it would not be a Judgment of the Court. This is an original Cause, and therefore ought not to come at first Step to the last Resort: And the Reason, because generally original Causes are mix'd with Fact as well as Law, which is below their Dignity to determine; because concerns only individual Cases, and are not general Points of Law; which reach to all Causes within the like Reason. If Error in Fact happens here, a Writ of Error lies not thereof in Parliament, but here before our selves; and this is out of Necessity, because the Parliament cannot try the Fact: But out of other Courts, inferior to the King's Bench, Error doth lie into King's Bench upon Errors in Fact. If the House of Lords had original Conusance, the Party would lose the Benefit of an Appeal; and to have a Man's Right finally determined by the first Judgment is not consonant to Law: And therefore a Writ of Error brought into the House of Lords, of a Judgment in the Common Pleas or Exchequer, *per Saltum* is void. 4 *Inst.* 21. So was the Earl of Macclesfield's Case. The proper

per Remedy for a Title of Peerage is by Common Law; by Petition of Right to the King, which he indorses *soit droit fait*, &c. and delivers it to the Chancellor, where there is Occasion; and in such Petition the Party ought to set forth his Right and Title, as the Defendant doth here in his Plea; and when indorsed and sent into Chancery, a Commission issues out to inquire the Truth of his Suggestion; and if the Inquisition find it true, then the Attorney General may confess it or traverse it; and upon the Traverse an Issue is join'd, the Record must be sent into the King's Bench, and there tried, and Judgment given. *Stamf. Prærog.* 72, 73. And these Proceedings are such as are in other Cases, where the Subject is aggrieved by the King, or those employed under him, whether it concern Lands, Personal Things, &c. As to the Precedents cited, my Lord *Delaware's* Case was referred to the Lords, not by Way of Judicature, but for their Opinions and Advice; and if the Lords had then conceived they had a Judicial Jurisdiction, it is to be presumed they would not have waved it, and submitted to have taken it upon them by Way of Reference; and the Queen did not in that Case proceed Judicially, by Indorsement of the Petition to the Chancery: But the Case concerning the Lords, she took their Advice, and comprised it in an extrajudicial and amicable Way; and so was the Earl of *Oxford's* Case by Consent, and not by Judgment of the House of Lords; and the Lord *Abergavenny's* Case is recited to be by Way of Reference: The Lord *Mountjoy's* Case was concerning Precedency, and so within their Conusance, as a Breach of Privilege, and was a Point necessary to be settled before he was introduced; but the Inheritance of the Dignity and Title is not in Question: The Lord *Preston's* Case was, that he gave out in Speeches, that he was an *English* Peer, which Assumption was a Breach of Privilege; and when he was demanded of the Truth of his Pretence, he produced a Patent, which appeared void, as if it had been under the *French* King's Seal; and it was directed he should be prosecuted as a Criminal. 2dly, There is no Plea pending concerning the Right of the Earldom; the Defendant's Petition does not pray to be admitted to the Earldom, but supposes him in Possession of it, and also desires to be tried by his Peers. The Lords on this could not adjudge he should enjoy the Earldom, because he does not demand or pray that; no more can they that he should lose it. Every Judgment must be *pro* or *con.* answerable to the

the Demand of the Plaintiff, and adequate and proportionable to it. 3dly, This Order appears to be no Judgment, but an Opinion: It is no Exclusion from the Enjoyment of the Office or Honour, which ought to be in every Judgment; and it is not sufficient that it declares the Right: As in a *Quo Warranto*, *videtur Cur'*, that Defendant hath no Title to the Franchise, is not a Judgment, but a Foundation of the Judgment only, but the Judgment ought to be *quod amoveatur*, &c. for every Judgment ought to be such as it may be executed. So in *Levett and Hall's Case*, 2 Cro. 284. Judgment against the Plaintiff, without *nil capiat per Billam*, is not good. The Judgment here is such as cannot be executed. The Dismissal of a Petition is the Form of a Judgment in a Court of Equity, but not in a Court of Law. In a Judgment, it is not sufficient that the Party has no Title, but it must be expressly adjudg'd that he hath none.

As to the *secundum Legem consuetud' Parliamenti*, that is added by the King's Council only *in terrorem*. *Lex Parliamenti* is *Lex terræ*, and if a Question concerning it doth arise in a Cause of which the King's Bench has proper Cognisance, the King's Bench may adjudge of it, as the Spiritual Courts do of Temporal Judgment, as Patents, Deeds, &c. for the Cognisance of the Principal draws to it the Cognisance of the Accessories and Incidents. Dy. 60. And this holds in Case of Privilege of Parliament; as in *Sir George Benyon's Case*, Trin. 14 Ca. 2. G. B. where filing an Original against a sitting Member, was adjudged no Breach of Privilege; so a Writ of Error in Parliament, if a Term intervenes after the *Teste*, and before the Return, hath been adjudg'd to be no *Supersedeas* of Execution. So on a *Habeas Corpus*, the King's Bench hath determined what Continuance a Commitment by Parliament shall have. That can be no Law or Custom of Parliament, which is not grounded on Precedents; and there is none that ever any Man's Inheritance was determined *per legem & consuetudinem Parliamenti*. It is no new Thing for our Common Law Courts to examine Matters of this Nature, which concern Proceedings in Parliament; we do but follow the Examples of our Predecessors. In 38 Ed. 3. 14. The Bishop certified to this Court, the Father and Mother were married, but that the Party was born in Adultery; the Lords sent a Writ to the Judges, and ordered them to judge on the special Matter, but the Judges did not obey. In *Stanton's Case*,

15 Ed.

Filing an Original against a sitting Member, has been judged no Breach of Privilege.

*In Lord
Bridgman's
Judgment
in Sir George
Benyon's Case in
vol. 2. of his Lord-
ship's Reports.
per neminem.*

15 *Ed. 3. F. Vouch.* 109. the Lords commanded the Court of Common Pleas to give a Judgment; the Chief Justice refused; after in his Absence the others complied, and gave Judgment; the King's Bench after examined the Proceedings of the Lords, and adjudged them void; as appears 15 *Ed. 3. 1, 2.* in the *Oxford Library*. We are not to delay the Justice of the Land, and the Law of it is our Rule; and for these Reasons let Indictment be quashed. But Defendant remained in Custody on a second Indictment, wherein he is named Earl of *Banbury*.

D E

Term. Sanct. Mich.

Anno 6 W. & M. 1694.

Sutton versus Sparrow.

A PPEAL of Murder *de morte viri*; it was carried down to be tried at *Nisi prius* in *Yorkshire* last Assizes; where both Parties appeared, but the Appellant did not put in the Record to try the Issue; and now the Counsel for the Defendant moved, that the Appeal being not tried, it was either a Nonsuit, or a Discontinuance: But *Holt* was of Opinion that it was neither; but order the Appellant to pay Costs for not going on to Trial; then moved that the Appellant might be called in, which was done; her Attorney appeared for her, which was held sufficient, the Appeal being brought by a Woman.

Appeal de morte viri carried down to be tried by *Nisi prius*, Appellant did not put in the Record; held neither Nonsuit nor Discontinuance; but Appellant to pay Costs. The Attorney appearing for Appellant, good, being a Feme.

S

Crosby's

Crosby's Case.

A Person indicted above two Terms for Treason, is a-fresh indicted for the same Species of Treason, but differently laid; Court inclined he should be bail'd, but gave no Opinion, but bail'd him by their discretionary Power.

Postea Hill.
3 W. 3. *The
King v. Comit
Aylesbury.*

HE was brought to the Bar by a *Habeas Corpus* the last Day of Term; it was prayed on his Behalf, that he might be discharged or bailed, having entered his Prayer the first Day of *Trinity* Term last, and was indicted the last Term; and afterwards this Term again was indicted for the same Species of Treason, but never tried on either of them: The Counsel alledged, that the End of the Statute was, that no Person should be above two Terms under the same Accusation; and if a second Indictment found should prevent his being set at Liberty, at that Rate, fresh Indictments being found every Term, he will never be discharged, and so the Statute would be eluded. Attorney and Solicitor General agreed, if the Case had stood singly on the first Indictment, he ought to be bail'd, but there is another Indictment for another Treason; the first was for a foreign Treason, in Conspiring the Death of the King, and the Overt-act was laid in *Ireland*; but the second is for a Treason in *England*. *Holt*: The Commitment and both Indictments are for the same Species of Treason, tho' the Overt-acts are differently laid; but the last Indictment agrees exactly with the Commitment; besides, the Prayer relates to the Commitment, so that the Party ought to be tried, for the Treason for which he is committed, within two Terms; and the Design of the Act was to prevent a Man's lying under an Accusation for Treason, &c. above two Terms. *G. Eyres acc'*, but both declared they would give no Opinion in the Case; but bail'd him by Virtue of their discretionary Power.

D E

Term. Sanct. Hill.

Anno 6 W. & M. 1694.

King versus Larwood.

INformation against the Defendant, setting forth, that *H. 4.* had granted to the City of *Norwich* to be a County; and that the Citizens and Community should chuse yearly a Mayor, and two Sheriffs; and that King *C. 2.* confirmed the Charter of *H. 4.* & *ulterius concessit*, that the Mayor, Sheriffs and Aldermen should chuse one Sheriff, and the Citizens and Commonalty the other; that the Defendant *liber homo Norw.* was elected Sheriff by the Mayor, &c. according to the Charter of King *Ch. 2.* and upon Notice of it *non prestitit Sacramentum officii, nec officium suum per se assumpsit.* The Defendant pleads in Bar, *quod non cepisset Sacramentum canæ Domini hic infra annum*, and therefore by the Statute of 13 *C. 2. c. 1. ipse est incapax, & electio vacua, & inde notitiam dedit*; and avers, that *ad generalem sessionem Norwici cepit Sacram' secund' 1 W. & M. & subscripsit declarationem secund' 30 Car. 2.* and is an Inhabitant of *Norwich*. Replication, that the Defendant *ut membrum Ecclesiæ Anglicanæ quolibet anno Sacramentum canæ Dominicæ cepisse debuisset, & per defectum suum proprium excusari non debet.* Rejoinder, *protestando quod non debuit, &c.* he pleads the Act of Indulgence, 1 *W. & M.* and avers *quod est protestans dissentiens, &c.* and repeats the Averments in the Bar: And Sir *Sam. Ashtree pro Rege* demurs. After several Arguments at the Bar, it was this Term argued by the Court. And 1. Exception was taken to the Information, that it did not appear by it that the Defendant was lawfully chosen Sheriff; for *H. 4.* vested the Election in all the Commonalty

Salk 167.

4 Mod. 269.

Skin. 574.

Carth. 306.

Comb. 315.

A Person can-

not excuse

himself for

not executing

the Office of

Sheriff, on

Account of

his not ha-

ving taken

the Sacrament.

Commonalty and Citizens, and it is an Interest vested in them, which cannot be divested but by Forfeiture or Surrender. The King by his Letters Patent cannot do this Wrong, and particularly Patents of Confirmation cannot make this Alteration. But resolved *per Holt* and *Gregory*, (*cont. S. Eyres*, who held the Acceptance of the second Charter by Commonalty did not sufficiently appear,) that the first Charter had vested the Election in the Populace, and could not be divested by the second, and placed in a select Number, without the Assent of all; but by such an Assent it might; and that here had appeared a sufficient Acceptance, by the Election alledged in the Information, which is an Execution of the Constitution in the second Charter; and the Defendant in Pleading does not dispute his Election, but insists on his Incapacity. 2. Exception was taken to the Rejoinder; that the Statute of Indulgence ought to have been pleaded in Bar, and that the Pleading it in Rejoinder was a Departure. The Defendant in his Rejoinder may make good and fortify the Matter in his Bar, if it be *ad idem*; as if a Statute be pleaded, and replies that it was repeal'd, Defendant may in Rejoinder shew it revived; but here it does not fortify, but is new and not *ad idem*; for in the Bar he insists that the Election is void by the Stat. 13 *Car.* 2. and in the Rejoinder, tho' it is not void, which contradicts the Bar, yet the Act of Indulgence excuses it; and this was admitted on the Defendant's Part, and resolved by the Court to be a Departure. 3. As to the Effect of the Act of Indulgence, whether Non-conformity is an Offence since the Act of Toleration, they would not give any Opinion; (*videlicet, Holt & G. Eyres*, because it was out of the Case,) but *Sam. Eyres* declared his Opinion, that the Statute did excuse the Defendant, tho' otherwise liable. 4. For Defendant it was urged, that the Statute of Indulgence was a general Law, which need not be pleaded; and the Defendant hath sufficiently shewed himself to be within the Qualifications of it by the Bar; but *per Cur'*, it was resolved the Defendant could not take Advantage of the Statute without pleading it. 1st, Because it is a private Statute and extends only to Protestant Dissenters, of whom no Act before has taken Notice. 2dly, Be it a private Act or not, the Court cannot take Notice, whether the Defendant be within it or not, if he does not shew himself to be within it, *viz.* not only that he is a Protestant Dissenter, but also that he goes to Religious Meetings, &c. 5. The principal Point was the Matter in Bar; whether the Omis-

tion of the Sacrament excused the Executing the Office upon the Statute of 13 Car. 2. And it was resolved *per Cur'*, 1st, That the King can command the Service of his Subject, and none can disable himself. 2^{dly}, *Per Holt & G. Eyres* resolved, that the Statute was not made to deprive the King of the Service of his Subjects dissenting, but that they ought to qualify themselves. *G. Eyres* resembled it to the Case of 23 El. which requires all People to come to Church; and held that an Excommunication, which disables a Man to come to the Congregation, is no Plea, because it is in his own Default. And *Holt* said, this Case shall not be intended better than the Defendant has shewed it to be; and therefore he shall not be supposed for any Scruple of Conscience, but out of a general Neglect of all Things sacred. That by common Intendment, all the Subjects of *England* are Christians, and of the National Church; and by the antient Canon Law, receiv'd here as *Part of the Common Law*, every one ought to receive the Sacrament once a Year at least; and this is also required by the Rubrick, which is confirmed by Act of Parliament, and not doing it is an Offence; and this Offence, being the Neglect and Default of the Defendant, shall not excuse him from his Duty and Service to which he is liable by the Constitution of the Government; and this Plea is directly to contradict a Maxim of Law, that no one shall be admitted to stultify or disable himself: And he said, that in *London*, and other Places, since this Statute, Dissenters have been elected and submitted to a Fine, and never disputed it. But *S. Eyres* differed, and said *nemo debet bis puniri pro eodem delicto*, which here the Defendant should be punish'd on this Information, for not qualifying. 2. He shall be punished for the same Omission of the Sacrament, by Ecclesiastical Censures. 3. He shall be punished for accepting the Office without a Qualification. *Jud' pro Quer'*.

On Suit on the Statute of 23 Eliz. for not going to Church, Excommunication is no Plea.

Vide Hard. 406.
2 Rol. Rep. 438.
Brown's Case.

Walker versus Walker.

I*Ndebitatus Assumpsit*, among other Things, for Money won at Play; on a general Verdict, moved in Arrest of Judgment, that *Indeb' Assump'* does not lie; for tho' the Cast of a Die may alter the Property, for where the Money is staked, it is given on a Condition precedent, viz. the Cast of the Die; yet this is not a Consideration to raise a Debt or Promise; but it is only a Promise against a Promise, for which the sole Remedy is a special Action on the Case

Indeb' Assump' will not lie for Money won at Play.

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3 Lev. 118.

upon the mutual Promise; and to that Opinion the Court strongly inclined, altho' the Case of *Eccleston* and *Lewin* was mentioned, *Hill.* 33, 34 *Car.* 2. *Ro.* 534. *Temp.* *Pemberton*, and afterwards affirmed in *Cam' Scacc'*, where it was held a good Consideration; and *Acherly* cited *Sherbourn* and *Worlich* in *C. B. Trin.* 2 *W. & M.* to be ruled *per Cur'*, that a general *Indeb' Assump'* lay for Money won at Play for the Hazard; and *Bret* and *Firebrasse* upon the same Point in *Trover*; and the Chief Justice cited *Brown* and *Ludlow's* Case in *Hale's* Time, *Hard.* 485. 2 *Keb.* 758, 822. where it was adjudged that an *Indeb' Assump'* does not lie against an Acceptor of a Bill of Exchange, unless the Money was deliver'd to him to pay over; and that in that Case, if there were Effects of the Drawer in the Hands of Acceptor, it was not material; for it was after Verdict, where Want of Averment of Effects in the Hand of the Acceptor had been aided by Intendment, if necessary: But because the Point in Question was depending in *Cam' Scacc'*, in the Case of *Jackson* and *Cottgrave*, *M.* 3 *W. & M. B. R. Rot.* 610. unresolved; which was for Money won on a Wager; Judgment was staid here, and afterwards *per Cam' Scacc'*, by them and on Advise with the Judges of *B. R.* it was held that an *Indeb' Assump'* would not lie; and *Jackson* and *Cottgrave's* Case was reversed, and so in this Judgment never entered. Sir *Barth. Shower* cited a Case, where *Indeb' Assump'* lay for the Winner against him that held Stakes; *quod Holt concessit.*

Postea Mich.
7 W. 3. Anonymus.

D E

Term. Paschæ,

Anno 7 W. & M. 1695.

Williams & al, Executors of Mellys, versus Crey.

ACTION *sur* Case for a false Return; whereon they declared, that whereas the Plaintiff's Testator had recovered a Judgment against J. S. for 140 l. and had sued out Execution by *Fi' fac'* on this Judgment directed to the Defendant, Sheriff of *Wilts*; by Virtue of which *Fi' fac'* the Defendant did levy Goods to the Value of 101 l. but made a Return, that he had levied 19 l. of the Goods of the said J. S. and that he had taken other Goods to the Value of 40 l. which remain'd in his Hands *pro defect' emptorum*; and that the said J. S. had *nulla alia seu plura bona*; whereas the Defendant did levy Goods to the Value of 101 l. *per quod actionem accrevit*. And it was moved in Arrest of Judgment that no Action lay, because it was only a personal Tort to the Testator, and so not within the Equity of the Stat. *de bonis Test' asportat' in vita*. 4 Ed. 3. c. 7. cited. 1 Rol. Abr. 913. and Cro. Car. 297. And it was adjudged that the Action well lay for the Executor, being within the Equity of the Statute; and *per Holt*, Action *sur* Case lies for an Executor upon this Statute, for an Escape out of Execution in the Testator's Time; tho' it is a Doubt in the Books whether such an Action lies for Executor, in Case of an Escape upon mean Process in the Testator's Time: That if the Sheriff takes Goods in Execution on a *Fieri fac'*, they are now in the Sheriffs Hands for the Plaintiff's Use, and so are as Part of the Plaintiff's personal Estate; and if the Sheriff after returns *nulla bona*, the Plaintiff cannot have any Benefit of the Goods, but

Salk. 12.
4 Mod. 403.
Action on the
Case will lie
for Executor,
for a false Re-
turn to a *Fi'*
fa' in his Te-
stator's Time.

1 Jones 142.
Mason v.
Dixon.

but the Defendant in the *Fi' fac'* will have good Title to the Goods by the Estoppel, occasioned by the Return; and Plaintiff is wrong'd as to that which is Part of his personal Estate. But on Escape of the mean Process there is only the Loss of the Process.

King versus Crosby.

5 Mod. 15.
Skin. 578.
Whether Infamy arises from the Crime or Punishment. 2.

But not to be of Grand or Petit Jury.

3 Inst. 33, 34.
Postea Mich.

11 W. 3. The King v. Warden of the Fleet.

Pardon gives an Ability *de novo*.

Comparison of Hands no Foundation for Attainder, but may be used as circumstantial Evidence.

Ante p. 8.
Postea Mich.
7 W. 3. Johnson v. Baynes.
Mich. 10 W. 3.
Hawkins v. Gardner.

HE was tried for High Treason; and *Aaron Smith* produced as an Evidence, who had stood in the Pillory for giving Instructions to *Stephen Colledge*; and it was objected he was no good Evidence. *Sam Eyres* said, his Opinion had always been, that the Disability follows the Infamy of the Fact, not of the Punishment; but waving that, *Smith* was a good *Witness* by the late Act of Pardon. And *per Holt*, tho' the Pardon does not take away the former Disability, as a Reversal of a Judgment doth, yet it gives him an Ability *de novo*; but he intimated his Opinion to be, that the Disability followed the Infamy of the Punishment. At this Trial, several treasonable Papers were produced, which they swore they believed to be the Hand-writing of the Prisoner; and on this a Question arose, whether Comparison of Hands were sufficient; and *per Cur'*, it is not sufficient for the original Foundation of an Attainder, but may be well used as a circumstantial and confirming Evidence, if the Fact be otherwise fully proved; as in my Lord *Preston's* Case, his attempting to go with them into *France*, and principally where they were found on his Person; but here, since they were found elsewhere, to convict on a Similitude of Hands was to run into the Error of Colonel *Sidney's* Case.

One must plead *tout temps prist* always before Imparlance. If you bring Debt, or Annuity, and Part of the Quarter be paid, you must acknowledge Satisfaction for that, and declare for the Residue; *per Holt*.

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Term. Sanct. Trin.

Anno 7 W. & M. 1695.

HOLT: If a Bailiff find an outward Door open, he may break open all the inner Doors to come at the Party whom he hath a Warrant to arrest.

Sir John Dalston versus Eyenston.

MOVED in Arrest of Judgment, that two several Actions of different Natures were joined together, *videlicet*, Action on the Custom against a Carrier, and 'Trover, wherein the *Non culp'* be Issue to both; yet must be separately laid, as in *Sid.* 244. and adjudged *Mich.* Term after, that an Action on a 'Tort, and on a Contract, cannot be laid together; and Judgment arrested.

Tort and Contract cannot be joined. *Postea Hill.* 9 W. 3. *Courtney v. Collet.* 1 Vent. 365, 366. 3 Lev. 74, 99.

A double Plea is no Exception, on a general Demurrer, but it must be specially demurred to; *Per Cur'*. 1 Saund. 337.

Holt: If a Bailiff, having a Warrant from the Sheriff, on a *Capias*, sends another in his Room to arrest the Person, such Arrest is illegal.

Per Cur': If a Man be in Custody of the Marshal, on a *Reddidit se*, you may charge him on the *Reddidit se* in Execution with the Marshal, without making the Marshal acknowledge him in Court to be in his Custody: But if he be in Execution, you shall not charge him till acknowledged.

Holt: A Rent may be reserved on Words of Covenant; but where there is a Rent reserved, and a Covenant also for other Money in the same Deed, Debt will not lie for the

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the later; as if I demise twenty Acres, reserving 20 *l.* *per Annum*; and further agree with him in the same Deed, that for as many Acres as he shall plow up, he shall give 10 *s.* more for each *per Annum*; this last Sum is no Rent, and an Action of Debt will not lie for it.

Kirkham versus Wheely.

Salk. 543.
Comb. 318.
In an Action
qui tam may
plead Privi-
lege, tho' in
the Negative,
will be good.

Action *qui tam*; Defendant pleaded, that he was an Attorney of the Common Pleas, and that all Attornies of the *C. B.* have not been sued any where else than in the *C. B.* Plaintiff demurred; and it was said, that he should not have pleaded it in the Negative, and that he should have made a full Defence, whereas he only said *Venit & dicit*; and this being for the King, as well as for the Party, he may sue in what Court he pleases. *Per Cur'*: Pleading in the Negative is well enough, because there is Jurisdiction enough given thereby to the Common Pleas. If indeed it had been an Exception issuable in Fact, the Negative could not have been so well, because an Affirmative ought to be set forth to make a Traverse: But here the Matter is not traversable, not being triable *per Pais*, but a Matter in Law. 2dly, *Venit & dicit* is a sufficient Defence, according to 14 *H. 6.* 13, 19. 3dly, 'The King may sue in any Court, but an Informer cannot; and Prosecutor *qui tam* has been look'd on as no other than common Informers; for if in Case the Plaintiff should die, there is an End of the Suit, and the King is intitled to a Recovery: But for another Exception it was after adjudged insufficient. *Quare*, what it was.

King versus Bythell.

A good Judgment returned, tho' the Return not good; so would not discharge him, but put him to his Writ of Error.

Bythell was indicted for Buying and Selling Broad Money, at the Sessions of Oyer and Terminer and Gaol-delivery, and convicted and fined 100 *l.* and by *Habeas Corpus* directed to the Keeper of *Newgate* was brought to the King's Bench; and this Return was made, That he was committed to him, Keeper of *Newgate*, by Order of the Court of Sessions, *cujus tenor, &c. Will' Bythell convict' fuit, &c. ideo considerat' est per Cur', &c. & quod ibid. scilicet*, in the Custody of the Keeper of *Newgate*, *in gaola sub salvâ custodia quousq; finem persolvat*: And it was moved he might be

be discharged or bailed; because no legal Commitment appears by the Return, for the Word *Committitur* is not there; and if the Form of the Commitment were legal, yet here is no legal Officer to whom he is committed; for the Commitment is to the Gaol or Gaoler of *Newgate*, whereas it ought to have been to the Sheriff, for he is the immediate Officer to the Court. But *per Cur'*, he shall be remanded.

S. Eyres: The Return is not good; but here is enough to remand him, for there is a good Judgment returned; and if by an informal Return, where Judgment appears good, we should discharge him, we should at that Rate rid all the Gaols in *England*; and he cited *March* 52. there was a *Habeas Corpus* to the Porter of *Ludlow*, and on the Return tho' it appeared the Damages given were beyond the Instructions of the Council of the *Marches*; by whom Judgment was given, yet because a Fine was set on them to the King, and that remained unpaid, the Court remanded them; and so here, a Fine being set, the King would lose by this Discharge. *Holt*: The Commitment is not so regular as it ought to be, for he should have been committed

to the Sheriff, and by the very Word *Committitur*; but yet it appears he is committed by a Court that has Jurisdiction, for a very good Cause: Now tho' the Gaoler be not a proper Officer, by Law, to have the Commitment of him formally, yet actually he is so, and the Law takes Notice of him. If he suffers a voluntary Escape of a Criminal, it is criminal in him, and not in the Sheriff; and all Commitments of Felons by Justices of Peace are to the Gaolers: But when the Party comes to be tried, he is always supposed to be in Custody of the Sheriff. And it has been a Question, if the Gaoler suffers an Escape in a Civil Action, whether he is not liable to the Party's Action of Debt for Escape, as well as the Sheriff. *Hard.* 29.

Now the Question is, whether he shall be delivered on a *Habeas Corpus*, or put to his Writ of Error. In *Busbell's* Case, which was the first where any was delivered by *Habeas Corpus* from a Commitment of Justices of Oyer and Terminer, the Commitment was not good in the Merits of the Cause; but here it is otherwise. Then for the Word *Remaneat*, that is improper, it should have been *Committitur*; for tho' it appears by the Return, that he was in Prison before, yet it might have been for another Cause; but the Cause, for which he was imprisoned, being a good Cause, by a Court that has Jurisdiction, tho' an improper Word be used, it is not proper to discharge him on this Return of

Postea Hill.
8 W. 3. The
King v. Clerk.

Postea Mich.
10 W. 3. The
King v. Fell,
Keeper of
Newgate, cont.

Vide Vaugh.
135.
Postea Pasch.
12 W. 3. Dr.
Greenville v.
College of
Physicians.

the

the Gaoler; but if it be so on Record, he may have a Writ of Error.

Where Cause of Action arises in two Counties, it may be laid in either.

Per Holt: If a Cause of Action arises partly in one County, and partly in another, it is in Election of Plaintiff to lay it in which County he pleases; as if a Country Chapman sends a Letter to a Tradesman in *London*, to send him Goods into the Country, he delivers them accordingly, and they come to the Chapman's Hands; there the Cause of Action arising in both Counties, he may lay them in either.

Bailiff, to whom Writ is directed, must execute it himself.

Per Holt: As a Sheriff is not bound to execute Writs in Person, but may under Hand and Seal direct his Warrant to Under-Bailiffs, so the Bailiff of a Liberty may do the same; but then no Servant of the Under-Bailiff can execute a Warrant, but it must be by Bailiff himself, to whom the Warrant is directed.

Walker versus Rumbald.

4 Mod. 390.
Salk. 247.
Distress taken by the Bailiff of the Hundred of A. in the Hundred of A. and B. sold by the Bailiff of A. in the Hundred of B. having given personal Notice; good, being an entire Distress: And personal Notice is more than the Act requires, and answers the Intent of it.

TRover and Conversion; Special Verdict, that one J. S. made a Lease for Years of Lands in two Hundreds, rendering Rent, and for Rent arrear, Defendant as Bailiff distrained the Cattle as Levant and Couchant, and therefore gave personal Notice the same Day to the Plaintiff, as Owner of the said Cattle; and that the Plaintiff did not replevy them in five Days; that then the Defendant, the Constable of the Hundred, took the Distress, and in the Presence of the Constable of the Hundred of *Andover* did cause it to be appraised by two Appraisers in the Hundred of *Kinnersey*; and after the Appraisement sold the same: And the Statute of 2 W. & M. of Distress, it was objected, 1st, The Jury have only found a personal Notice, which is not Notice within the Statute; for the Notice prescribed, required, is at the Mansion-house or most notorious Place on the Premises. But *per Cur'*, The Intent was only to give a certain Notice; and seeing in this Case they have gone further than the Letter of the Act, a personal Notice must needs be sufficient. 2^{dly}, Notice was only given to the Owner of the Goods, and not to the Tenant in Possession. But *per Cur'*, the Words of the Statute are in the disjunctive, and Notice to either is sufficient. 3^{dly}, The Constable of *Kinnersey* administered the Oath, and caused the Goods

Goods to be praised and sold only in the Presence of the Constable of the Hundred of *Andover*; whereas the Act is express, that the Appraisement and Sale must be by the Constable of the Hundred, Parish or Place where the Distress is taken; and that the said Constable must be Aiding and Assisting therein, which is more than to stand by and be simply present. But *per Cur'*, it appears the Distress is intire, being at one Time, and the Land being contiguous; and then where such Lands are in two Counties, and the Goods are distrained for one intire Rent out of those Lands, this is one Distress; and by 1 & 2 P. & M. c. 12. they ought to be in one Pound; and whereas it is urged, the Appraisement must be made by the Officers of the Parish, or Hundred where Distress is taken; to that it was said, that the Continuing and Driving them to the Pound is a Taking; as *Latch 60. Jud' pro Def'*.

Per Cur': A Jointenant, without any Authority from his Companion, may distrain for the whole Rent; but he must particularly avow in his own Right, and as Bailiff of the other.

Postea Trin.
8 W. 3. The
King v. Wal-
cot.

King versus Kemp.

SCIRE facias out of the Petty-Bag, to shew Cause why a Patent of 27 Ca. 2. to *Kemp*, of the Office of Searcher to the Port of *Plymouth*, should not be repeal'd.

The Case was; King Car. 2. the 25th of July 12 ann. by Letters Patent granted, *durante beneplacito*, to *John Martin* the Office of Searcher; and afterwards, by Letters Patent 25 Ca. 2. 19 June, reciting the former, granted to *William Fryar*, for his Life, the same Office from and after the Death, Surrender or Forfeiture of *Martin*; after which *Fryar* surrendered his Letters Patent; and in Consideration of that Surrender, the King by other Letters Patent the 24th of December 27 Ca. 2. granted this Office to *H. Kemp* for Life, from and after the Death, Surrender or Forfeiture of *Martin*; and then in the same Letters Patent, reciting all other Grants, granted the said Office to *R. K.* for his Life, from the Death, Surrender or Forfeiture of *H. K.* or any other Way or Means by which the Office might come into the King's Hands or Disposition: And the Question was, whether these Letters Patent to *Kemp* were good, the Validity whereof depended on the Grant to *Fryar*; for if the Grant

2 Salk. 465.
4 Mod. 276.
Carth. 350.
Comb. 334.
Grant of an
Office by the
King, after
the Death,
Surrender or
Forfeiture of
the former
Grant of the
same Office,
good.

to him be void, the King would be deceived in the Consideration of his Grant to *Kemp*, which was the Surrender of *Fryar's* Letters Patent; and it was adjudged for the Defendant by *Sam. Eyres* and *Holt*, and that the Letters Patent to *Fryar* were good. *Eyres*: There have been two Objections made, 1. That an Estate for Life cannot depend on an Estate at Will. 2. That *Fryar's* Estate cannot by Rule of Law commence after the Death, Surrender or Forfeiture of any Estate at Will, which *Martin* had.

As to the *First*; this is not like a Grant of Lands which are in Being, wherein a Freehold may take in Possession, or be supported by a particular Estate in Being. 'This Office is no longer in Being than it is granted by the King. As to the *Second*; *Fryar's* Estate may have a good Commencement, tho' it be objected, that the King was deceived in his Grant. This Difference is to be observed in all Cases where the King is said to be deceived in his Grant: *If the Matter which is false in the Letters Patent, be suggested on the Part of the Grantee, and that to the Prejudice of the King, there the King shall be said to be deceived in his Grant, so as to make it void: But where the Words of the Letters Patent are Words of the King, altho' the King appears by his Inference to be mistaken even in the Law, yet the King shall not be said to be deceived, so as to avoid his Grant. If the King grants an Estate in Possession, when he intends only to grant it in Reversion; or where the Thing granted is of a greater Value than it appears in the Grant to be of; these are the Suggestions of the Grantee; and the Death of the King in these Cases shall make the Grant void: But if the King be not deceived by any Matter suggested by the Grantee, but is only mistaken in his own Affirmation, or Surmises, altho' it be in the Law it self, such Grants are good; and such Construction of them shall be made as tend to their Support; and upon this Difference the Books are plentiful. 8 H. 7. 3. Dy. 197. b. 352. a. 2 Cro. 34. 2 Brownl. 242. 11 Co. Auditor Curl's Case, Mod. Rep. 197. So that, where he is not so deceived, the Grant shall not be void, if by any Construction it can be made good. Now to apply this aptly, the King is not here any Way deceived in his Grant, for the precedent Letters Patent are truly recited; the Suggestion of the Party is true, the King did intend to grant this Office to *Fryar*, only here is an improper Limitation of the Commencement to be after the Death, Surrender or Forfeiture of *Martin*; but these are the Words of the King, and if they may have any good Construction*

Vide Yel. 48.
2 Cro. 34.
Hob. 229,
230.

struction, they ought to take Effect: The Intent of the King seems to have been, that *Martin* should have an Estate for Life, and the new Grant take Effect after his Death; and there is no Reason why the Grant of an Office may not take Effect after the Death of Tenant at Will, because the Place may by Possibility determine after his Death.

But supposing the Commencement wholly void, as no Commencement at all, yet the King's Mind appearing, it shall commence on the Determination of *Martin's* Grant, whensoever it happens, according to the Opinion in 8 Co. Earl of *Rutland's* Case. *Holt*: The Grant to *Fryar* is good; It has been said to be void because to begin on the Death, &c. of *Martin*: Now as for the Death of *Martin*, that is certainly good, because it might well enough commence from thence. The next Thing is, whether it can commence from the Surrender; for it has been insisted on, that an Estate at Will might not be surrenderable; and it is very true, that an Estate at Will in Lands between common Persons is not a surrenderable Estate, because it is at Will of both Parties, and either Party may determine his Will, without the Formality of a Surrender; and therefore there is no Surrender at all in Law of an Estate at Will in Lands between common Persons. But when the King grants an Office at Will, that is not at the Will of both Parties, it is only at the Will of the King to determine the Interest in the Office that Grantee holds of the King, without any Surrender; for if it be an Office of Trust, for the Profit of the King, he is punishable by Fine for the Refusal of it; and of that he cannot divest himself without an actual Surrender, tho' it need not be proved: So it was done by two Chief Justices, *Hale* and *Pemberton*, who had an Estate at Will in their Offices, and made an actual formal Surrender by Deed inrolled in Chancery; and if the King determines his Pleasure, it must be by Writ of Discharge under the Great Seal, or by constituting a new Person. Then on the Commencing on the Forfeiture of *Martin*, it is said, that a Tenant at Will cannot forfeit his Estate, but only determine his Will; now I say, the King's Tenant at Will may forfeit, for it may be the King's Will not to determine the Estate till a Forfeiture; he will first inform himself by Inquisition on Record, whether the Party hath well behaved himself or no, before he will determine his Interest, which was Sir *J. Savage's* Case: When there is a Conviction on Record it is a Forfeiture; tho' if he be an Officer for Life, there must be a *Sci' Fa'*.

Estate at Will of Lands, no surrenderable Estate, because at the Will of both Parties.

Grant of Office at Will by the King, is only at Will of the King; for if it be an Office of Trust for the King, the Person is punishable for Refusal of it.

Fa. But suppose the King should determine his Will during the Life of *Martin*, without Surrender or Forfeiture, then *Fryar*'s Grant shall not commence during the Life of *Martin*, and in the mean Time the King may grant it to whom he pleases; but then the Question arises, if the King can grant an Office to commence *in futuro*, when there is no other Estate in Being to continue till the Office shall take Effect; or whether the King grant an Office to commence on a Contingency, a Year hence, or the like; and I am of Opinion he may; for tho' a Freehold cannot commence *in futuro*, that is to be understood where it is derived out of an Inheritance. If there be an Office in Fee, and the King has the Inheritance, there a Freehold can no more commence *in futuro* by Letters Patent than by Livery of Seisin; so is 5 Co. *Berwick's Case*. But if it be a new Thing created by the King, he may constitute it in what Manner he pleases; as a Rent *de novo* may be granted and created to commence *in futuro*, or on a Contingency, as in the Case of *Ed. 2.* quoted in *Corbet's Case*, 1 Co. 87. for it is a Creature of his own, and he may dispose of it as he pleases. Now tho' there were such an Officer as a Searcher, yet in regard there was no Estate at all therein, but it remained in the King to create an Estate, the Estate the King gives is a new Estate, and therefore subject to such a Disposition as he thinks fit. It is true, there are not many Precedents of such Dispositions till of late Days; but why a Grant *in futuro* should not be good in such a Case as this is, it would be hard to assign a Cause; and therefore Judgment *pro Def*.

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Term. Sanct. Mich.

Anno 7 W. III. in B. R.

Anonymus.

PER Holt: No *Indeb' Assump'* lies for Money won at Play; for Money stak'd on a Wager it does, but not otherwise; for when the Money is in the Custody of a third Person, there the Winning the Wager determines whose Property it shall be.

3 Lev. 118.
No *Indeb' Assump'* lies for Money won at Play.
Ante p. 70.

St. Leger and Pope.

HOLT: Debt, with an Averment in the Declaration, differs from the Condition of a Bond; for the Plaintiff here must fully intitle himself to an Action, but the Condition of a Bond goes only in Defeasance, and must come on the Part of the Defendant; and he says here, the Plaintiff does not intitle himself to any Action, for he has no Cause of Action, unless the Hundred Guineas, as well as the Value, were unpaid.

1 Lut. 484.
4 Mod. 406.
5 Mod. 4.
1 Salk. 344,
484, 487.
Carth. 322.
Comb. 327.
Debt, with Averment, different from Condition on a Bond.

Where Foreign Coin it self is demanded, the Action is in the *Detinet*; but if the Value be demanded, it is in the *Debet* and *Detinet*; and the Averment always is, that the Defendant hath neither rendered the Foreign Coin nor the Value.

Y

King

King versus Row and Kendall.

f. l.

{ 5 Mod. 78.
Salk. 347.
Comb. 343.
Skin. 596.
Commitment
to a Messen-
ger by Secre-
tary of State,
good; tho'
the Species of
Treason must
be express'd,
else ill.

MOTION to discharge *Row* and *Kendall*, committed by the Secretary of State, being charged with High Treason, in being privy to and assisting the Escape of Sir *James Montgomery* out of the Custody of one *William Sutton*, one of the King's Messengers in Ordinary, and charged with High Treason. *Per Holt*: 'The Power of the Secretary was never questioned till lately; and as for his Commitment to a Messenger, it is good; for he may be committed for a Time to any Body, while he is under Examination; but tho' for that Cause this Commitment had been irregular, it is a Question if it would not have been void. *Rookby* said, that as to the Messenger, he may be taken as a Carrier of him to Prison, and so good.

Then it was excepted, that the Warrant does not shew for what Treason Sir *J. Montgomery* had been committed; and so it might have been for Counterfeiting the Great Seal, and then no Treason to receive him. 12 Co. 81. So receiving a Jesuit is no Treason, but made Felony, 27 Eliz. *Holt*: If an Act of Parliament makes a Felony, Accessories before and after are Felons, tho' not mentioned; and here he is affected with the Treason of Sir *J.* *Per Eyres* and to *Rookby*, the Species of Sir *J. M.*'s Treason ought to be express'd; and for Want of that they shall be bail'd; and so they were.

Herman versus Denué.

Union of Pa-
rishes before
and since the
Fire of Lon-
don.

NOrthey moved on the Stat. 22 Car. 2. c. 11. about the Rates for Repairing the Church of St. *Swithin*; and *per Holt, Rookby* and *Eyre*, at Common Law there might be an Union; but that was only of Churches, and but as an Appropriation of one Rectory to another, but still the Parishes were distinct; and that did not make the Parish Church of *A.* to be the Parish Church of *B.* but the Incumbent was as well Incumbent of *B.* as *A.* and is obliged to serve the Cure, if necessary. But by this Statute, the Parish Church of St. *Swithin* is the Parish Church of St. *Mary Bothaw*, and the other Church is thereby destroyed; and therefore that Parish must repair St. *Swithin*'s; the Rates are made distinct in this Case, which the Court seemed to approve.

Price & al' versus Rouse.

ROUSE Church-warden & al' libel'd in the Spiritual Court, for their Proportion of a Church-Rate for Repairing the Chancel and Church, whereas the Parson *de communi jure* ought to repair the Chancel, and no Distinction being made, Prohibition ought to go to the whole. *Per Cur'*: Let it be so; of common Right, that is by the antient Canon and Civil Law, the Parson ought to have repair'd the whole Church; and it is by the Custom of *England* only that the Parish repairs the Body.

Parson, and not Parishioners, to repair the Church.

Anonymus.

IF an Apprentice be discharged from his Master, the Statute requires the Discharge to be under the Hands and Seals of four Justices of Peace: But in a *Certiorari* to remove an Order of Sessions thereon, it is sufficient the Order take Notice of the Discharge so made, and it is not necessary to certify the Discharge it self.

Apprentice should be discharged under Hands and Seals of four Justices; but on *Certiorari* to remove an Order, not

necessary to certify the Discharge.

Bowers & Ux' versus Coke Executrix of Coke.

DEBT upon a Bond against the Defendant as Executrix of her Husband; she pleads that he died Intestate, and that Administration was committed to her, &c. *Unde petit jud' si ipsa ad bill' prad' respondere compelli debeat*. Exception was, that Defendant did not traverse; *absque hoc*, that she administrated as Executrix; *per Cur'*, this Plea is better without a Traverse, for he shews the Plaintiff in what Manner he is chargeable; he hath confessed and avoided all the Plea, hath shewn that a rightful Administration was committed: It is a foreign Intendment that he has administrated any other Way; and if he hath so done, you should have come in and shewed it in your Replication; but then *this Conclusion is ill in Abatement*; every Plea should have its proper Conclusion; this should be *quod billa cassetur*. It is indeed a good Plea to the Jurisdiction of the Court, but not in this Case; and a *Respondeas ouster* awarded.

5 Mod. 136, 145. Salk. 298. Plea, that was Administrator and not Executor, good Plea in Abatement, but should conclude *quod billa cassetur*, else ill. Ante p. 46.

Johnson

Johnson versus Baynes.

Comb. 346.
In Avowry
for Part of a
Rent, how
the Rest was
satisfied must
be shewn.
Ante p. 72.
Postea Mich.
10 W. 3.
Hawkins v.
Gardner.

DEmurrer on Replication; because the Avowry was only for Part of the Rent, without shewing how the rest was satisfied; and *per Holt*, if a Rent of a Quarter be 20*l.* and you avow only for 10*l.* you must shew how the rest is satisfied, just as in Declaration for Part of a Debt due upon a Bond; and for this *Holt* and *Sambach's* Case is clear. 1 *Cr.* 103, 104.

Wigmore versus Veal.

Ante p. 8, 72.
Tender cannot be pleaded
after Impar-
lance, for no
Bar to the Ac-
tion, but ex-
cuses the Pe-
nalty.

Postea Pasch.
12 W. 3. Pa-
ramour v.
Johnson.

ATender cannot be pleaded after Imparlance; it is no Bar to the Action, and only excuses the Penalty; and therefore in Pleading a Tender, you must plead *touts temps prist*, and conclude *petit judicium de damnis*, which can never be after Imparlance.

If a *Fi' fac'* be taken out and renewed within a Year, and so within every Year, you may enter your mean Continuances.

Lord and Lady Gerrard.

5 Mod. 64.
Salk. 54, 253.
3 Lev. 401.
Vide ante
p. 59.
Feme not
dowable of
*Caput Baro-
nie*, but of
a Capital Mes-
suage shall.

ERROR of a Judgment in Dower from *C. B.* the Question was, if the Lady *Gerrard* were dowable of *Browtley Hall*, being pleaded to be *Caput Baron'*; and *per Cur'*, there are there Sorts of Barons, by Tenure, Writ and Patents; the first, which were Feodal Barons, held a certain Territory of Land *per Baron'*, wherein there was a Castle, whereunto all the Inhabitants in Time of War resorted, and these were the *Capita Baronie*; and there was no Dower of them, because they were for Defence. By Custom we call Noblemen Barons of such a Place, but that is no Barony; for a real Barony is when the King grants Lands, Rents, &c. to be held *per Baron'*; none of which have been granted since *R. II.'s* Time.

I

Herbert

Herbert and Walters.

REplevin; Defendant avows, as Overseer of the Poor, 5 Mod. 112. Salk. 205. Skin. 595. Comb. 344. on the 43 *El.* the Plaintiff was nonsuited, and the Jury omitted to inquire of Damages; the Question was, if this Omission could be supplied by a Writ of Enquiry, within the last Paragraph of the Statute; and *Holt* delivered the Opinion of the Court, that it might. It is true, if there be an Issue, and the Jury find the Issue, and omit to inquire of Damages, that cannot be supplied by a Writ of Enquiry; for the Jury have discharged themselves; for the finding of Damages was Part of their Issue: But here is no Omission, the Jury was not charged, and therefore a Writ of Enquiry may go; besides, after Verdict, Damages cannot be supplied by a Writ of Enquiry; because the Party would lose his Remedy by Writ of Attaint, which lies not in this Case; and so is *1 Cr. 143. Darrosse and Newbott, 1 Rol. Rep. 272. Brampton's Case, 2 Rol. Rep. 112. 1 Sid. 380.* This has been the Difference taken in all Cases, that where no Attaint lies, an Omission may be supplied by Writ of Enquiry; and therefore let it go here. Where Jury not charged with Enquiry of Damages, may be supplied by Writ of Enquiry: And where-ever an Attaint lies not, an Omission may be supplied by Writ of Enquiry.

Young and Rud.

A*ssumpsit* for Goods sold; Defendant pleaded, that he gave him a Beaver in Satisfaction, and that he accepted it in Satisfaction; Plaintiff replies by Protestation, that he did not give it in Satisfaction, *absque hoc*, that he did not receive it in Satisfaction; and *per Cur'*, Pleading the Giving in Satisfaction, without the Receiving in Satisfaction, is not sufficient, for there must be a mutual Act done, one must give, and the other must take; and in this Case either of them are traversable. *Jud' pro Quer'.* Salk. 627. Carth. 347. 5 Mod. 86. Comb. 346. Whatever is given in Satisfaction must be taken in Satisfaction.

Stayner versus Burgesses of Diotwisch.

UPON a Trial at Bar, *Camden's Britannia* was offered in Evidence to prove a particular Custom; but Court would not admit it; for general History that relates to the whole Kingdom is proper to be given in Evidence in a Matter relating thereunto; and the Nature of the Thing requires it, when it cannot otherwise well be proved; and Salk. 280. Camden's Britannia, to prove a particular Custom, in Evidence refused.

Z

therefore

Skin. 15.

therefore in *Neal* and *Jay's* Case, a Deed was produced i *P.* & *M.* and Chronicles were admitted to prove that King *Philip* did not use the Stile which was in the Deed at that Time; so in *Robert Henly's* Case, to prove the Course of the Court, the Year-Books were read in Evidence; Heralds Books have been allowed Evidence in Pedigrees; and Register-Books of Parishes, in Christnings and Marriages, tho' no Law for it; for the Nature of the Thing requires it.

Stedman versus Page.

Coparceners
must join in
Avowry.
5 Mod. 141.
Sal. 390.
Comb. 347.

REplevin; two Coparceners, one avows for the Moiety of the Rent; *per Cur'*, Coparceners are but one Tenant to a *Pracipe*, they must join in one Action of Trespass; and so in a *Mortdancestor*, where only the Right is concerned; and therefore much more in Replevin, which goes to the Right and to the Possession. *Jud' pro Quer'.*

Stayner versus Baker.

Promise cannot be extinguished by Bill under Hand alone.
Postea Trin.
12 W. 3. The
King v. Woolaston. Trin. 13 W. 3. May v. King.

A Bill imports it being under Hand and Seal, and not a Note in Writing only; a Promise cannot be extinguished by a Bill under Hand alone, because in Law it is of no higher Nature: A Bond is no Satisfaction of Money due, tho' it may be of Money before it is due.

Bond, no Satisfaction for Money due.

Smith and Sharp.

Salk. 139.
5 Mod. 133.
Difference between doing a Thing by a Man and his Assigns, and to a Man and his Assigns.

THERE is a Difference between doing a Thing by a Man and his Assigns, and to them; if a Thing be to be done by a Man and his Assigns, you must there alledge in the Disjunctive, that it was neither done by him, nor his Assigns: But if a Thing be to be done to a Man and his Assigns, you need not mention his Assigns; for if he has assigned it over, it must be shew'd of the other Side; *Per Cur'.*

Holford versus Lawrence.

A Judge of *Nisi prius* may by Consent of Parties make a Rule to refer, and then oblige them to stand to the Determination; yet the Sessions cannot so do, tho' it be by Consent; yet we must allow them such a Power: They may indeed refer a Thing to another to examine, and make a Report to them thereof, but not, as in this Case, to be finally determined by him.

Judge of *Nisi prius* may by Consent make a Rule to refer, and oblige the Parties to stand by it; so cannot Justices, but must be as their own Order.

Per Cur': The second *Scire fac'* shall not be taken out before the first be returnable.

Postea Trin.
8 W. 3. Philips v. Crab.

D E

Term. Sanct. Hill.

Anno 7 W. III. 1695.

Fletcher versus Ingram.

R Eplevin; the Defendant justifies as Bailiff to Sir R. G. that the Place *where* is within the Manor of D. and that they have by Prescription a Court-Leet there; that they have a Custom, that the Jury shall choose a Constable, and impose a Penalty upon him of 40s. if he refuses; that the Plaintiff was elected at a Court-Leet, under the Penalty, & *inde notitiam habuit*, but did not execute the Office; whereby he incurred the Penalty of 40s. of which there was a Presentment the next Court;

5 Mod. 124.
and the Pleadings there.
Salk. 175.
Comb. 350.
Skin. 635.

Sir T. Jo. 212. Steward cannot fine a Person for not executing the Office of Constable, unless he refuses in open Court; but must be presented by the Homage next Leet, and to be amerced, and that assessed.

Notice, *notitiam habuit* is too general. Vide *Holt's* Opinion, *ante* p. 29.

Court; but he totally omitted to pay it; and therefore Defendant distrain'd; Plaintiff demurred; & *per Holt*, a Constable belongs to every Leet of common Right; but whether of common Right the Steward, or Jury ought to choose him, hath been controverted: But suppose of common Right the Steward ought, and by Custom the Homage do, if the Person thus elected do refuse in Court, the Steward may impose a Fine upon him; indeed, if he be not present, the Steward cannot fine him, because the Omission or Refusal is out of Court; and therefore he is to be presented to the Homage next Leet, and to be amerced, and the Amercement to be assessed; which Fines and Amerciaments, being by common Right, may be levied by Distress; now here is a customary Penalty contrary to common Right, you tax the Penalty before the Refusal; and so this being not of common Right, you could not have distrain'd, without alledging a particular Custom for so doing. Then as to the Notice, *Notitiam habuit* is too general; you should have pleaded, he was summoned within a convenient Time to take the Oath before a Justice of Peace, which is the Course usually taken; for the Steward, after the Adjournment of the Court, has no Authority; and tho' before the Statute of 13 & 14 Car. 2. the Justices of Peace could not make Constables, yet swear them they could. But if it be objected, that Justices of Peace could not swear them, for they are within Memory of Man, and Leets have been by Custom *temps dont*, &c. Answer; tho' as to the Form of their Commission and Authority, they are of late, yet they have the same Power as Conservators of the Peace at Common Law had: All the Conservators Power is vested in the Justices, and in that Quality they shall be intended to swear Constables. *Rookby*: The Defendant has fail'd in not alledging before whom the Oath ought to have been taken, and not alledged a Custom for the Distress. *Jud' pro Quer'*.

Darnall moved to quash an Indictment for Want of *ad tunc* & *ibid' impanellat'*; it has been often adjudged, that the Want of *onerat'* is bad. *Cur'*: Let it be quashed *nisi*, for *returnat'* will not supply it.

King versus Parish of Wootton Rivers.

JUDGMENT was given in this Case *per Holt*, delivering the Opinion of the Court, that the Order is good, tho' it is not said, that he rented a House of 10*l.* a Year, according to 13 & 14 *Car.* 2. for it has been the constant Practice never to express it; but this Order is bad, because it is only said to be on Complaint generally, and not on Complaint of the Overseers and Church-wardens; this spoils the Order, for no Man can disturb another coming into a Parish, except he have Authority so to do. A Complaint *ex officio* to the Justices is nothing; it may be the Parish is willing to keep the Party, and if so, the Justices cannot remove him on Complaint: And tho' the Justices have return'd on the *Certiorari*, that this Order was made on the Complaint of the Church-wardens, that will not help it, because it is but a bare Suggestion, tho' return'd on Record.

Salk. 492.
5 Mod. 149.
In the Order it is not necessary to say the Person rented a House of 10*l.* per Annum: Order must be on Complaint of the Church-wardens and Overseers.

Chamberlain and Huetson.

THERE was a Libel *ex officio* against *Chamberlain* for Incontinency, at the Promotion of Mrs. *Huetson*, which is alledged to be with her Husband; whereupon there is a Sentence given, Penance enjoind, and according to the Course of the Court, Costs awarded to *Huetson*, who is not divorced *a mensâ & thoro* from her Husband; the Husband releases the Costs to *Chamberlain*; she pleads this in the Ecclesiastical Court, and the Plea being refused, she prayed a Prohibition. *Holt*: Now I take this Difference; if a Feme Covert sues for Defamation in the Spiritual Court, and there she obtains Sentence, and Costs are given her, if she cohabits with her Husband at that Time, he may release them; but if she be divorced *a mensâ & thoro*, tho' the Marriage still continues, he cannot; because if there is a Divorce, the Husband is to allow the Wife Alimony; and if she has Alimony, the Costs expended in the Suit are supposed to issue out of it, and therefore the Husband cannot release it, because she has it separate; which is the Reason, tho' not mentioned, of *Motam's Case*, 2 *Rol. Ab.* 301. But if such Feme Covert, after such a Divorce, sue for a Legacy, which Legacy if she recovers comes to her Husband, there the Husband may release, 2 *Rol. Abr.* 301. because there is no

Salk. 48, 115.
5 Mod. 69.
Husband may release Costs awarded to his Wife in the Spiritual Court, if there be no Divorce; if there be, he cannot, because supposed to arise out of her Alimony: But Husband may release a Legacy, tho' after Divorce.

A a

Alimony;

Alimony; and if he may release the Duty, he may release the Costs: Therefore in this Case he may release the Costs, there being no Divorce; I think a Prohibition must be granted. But *Rookby*, on Account of the Scandalousness of the Cause, was against it; and after a Proposal was made for bringing Money into Court, for Mrs. *Huetson* to take out as she had Occasion to carry on the Charges of the Prohibition, and then to declare; *sed materia dormivit*.

Culliford versus *Cordonmy*.

Salk. 466.

Comb. 356.

Bond for Deputy to have Half the Profits of an Office which is within the 5 *Ed. 6.* is good, not being for a Sum certain.

IF a Deputy gives a Bond to account for the Profits he receives, and to pay his Master Half of them, that is not within the Statute of 5 *Ed. 6.* for it is reasonable that the Deputy should be paid for his Pains: If it had been for a Sum in Gross, or the Payment of an annual Sum, not issuing out of the Profits of his Office, it had been ill; but this well enough. *Jud' pro Quer'.*

Burman versus *Sheppherd*.

Comb. 357.

In Trover for a Bill of Exchange, Money not allowed to be brought into Court.

Postea Trin.

8 W. 3. Paw-

let v. Heat-

field. Pasch.

10 W. 3.

Smith v. John-

son. Mich. 10

W. 3. Lawly

v. Dibble.

Pasch. 12 W. 3.

Farrell's Case.

IN Trover for a Bill of Exchange for 100*l.* *ad damnum* of 150*l.* a Motion was made, that upon bringing 50*l.* into Court it might be struck out of Declaration. *Holt*: This Practice in *Assumpsit* has been brought in within few Years, and has been only allowed, because Payment goes to the Issue; but in Trover it goes only to the Damages. It may be the Plaintiff has good Cause of Action for Part, and a probable Cause for the Residue; now it would be hard to strike out his certain Cause, and put him to try his probable Cause, at the Peril of Costs.

D E

Term. Paschæ,

Anno 8 W. III. 1696.

Armitage versus Row.

MOTION made, that Plaintiff may file his Original, and enter up the Issue on Record, for he hath since arrested the Defendant three Times for the same Cause of Action; and the Defendant doubted whether he might plead in Bar another Action pending, with a *prout patet per Record*, before it was enter'd. *Per Cur'*: He may; if they do not enter it, you may, without any Motion in Court, give a Rule to enter it.

May plead in Bar another Action pending for the same Cause, *prout patet per Recordum*, before the Issue is enter'd.

Per Holt: The Altering the antient Method of the Common Pleas, as to the Imparlance-Roll, and the Plea-Roll, hath caused great Confusion. Formerly a Declaration was entered on the Roll the same Day wherein the Writ was returnable, with an Imparlance over to the next Term, which was called the Imparlance-Roll, and then the next Term they entered their Declaration over again, with an *Alias prout patet* on another Roll, which they called the Plea-Roll: But now the Prothonotaries have thought fit to alter the Course, making the Plea-Roll an original Roll of the subsequent Term, without an *Alias prout patet*, or any Relation to the precedent Term; except in the Case of Privilege and *Sci' fac'*, where they now enter an *Alias prout patet*. There was a Case sometime ago by Writ of Error in this Court, which was settled after great Argument, *viz.* *Moyle and Hawkey*, wherein there was Entry, with a Continuance to the subsequent Term, but no Entry in the subsequent Term, with an *Alias prout patet*, or any Relation to the precedent Term, and yet we affirmed the Judgment, because of the new Practice now introduced.

Robert

Robert qui tam versus *Witherhead*.

Pleadings.
5 Mod. 191.
Salk. 223.
Comb. 361.

Vide 1 Inst.
46. b.

DETINUE on the Statute of 12 Car. 2. c. 18. of Navigation, for thirty-six Barrels of Oyle of 639 lb. as Forfeiture, for importing Goods in a Vessel not belonging to *England*, nor being navigated by the Master and Mariner, three Parts whereof were *English*, &c. And the Question was, whether Detinue lay on this Statute; & *per totam Cur'*, Judgment *pro Quer'*. *Holt*: The Design of this Act was to make an immediate Alteration of the Property of the Goods; the one Moiety to the King, the other to him who would inform, or sue for the same. If he had seised the Goods, or any Part, in the Name of the whole, no one will doubt but Detinue would have laid. At Common Law, a Villain had absolute Property, and the Lord had it not till Seifure made. If a Villain before such Seifure had alien'd, the Lord could not touch them; but if they were distrained before Seifure, Lord could replevy them. 1 Inst. 145. b. And yet a Replevin supposes an antecedent Right as much as a Detinue; and the Reason is, because the bringing a Replevin amounts to a Claim and Seifure, and *eo instante* vests the Property in the Lord. In Debt upon a Bond, where the Contract is to pay the Money on Request, the Party brings his Action without any Request, yet the bringing the Action is one; so here the bringing a Detinue amounts to a Seifure. *Rokeby*: The Property is divested out of the Owner, by Importation, but not vested in him that sues 'till bringing the Action, or Seifure.

Hoard versus *Tenison*.

Comb. 361.
Salk. 227.
In Case, the precise Day is not material; and if you force the Plaintiff to vary from it, it is no Departure.

Postea Mich.
8 W. 3. Black-hall v. Eccles.
Mich. 8 W. 3.
Wall and Dukes.

ACTION *sur* Case for six several Promises, all of them laid the 21st of *October*; Defendant pleaded *infra statum* generally; Plaintiff replied specially as to two of the Promises *præcludi non debet*, because the Defendant was of full Age at the Time of making them; and *quoad placitum* as to the rest, it was *pro necessario vestitu* according to his Degree. Defendant demurr'd, because Replication was repugnant in it self; it being impossible a Man should and should not be of Age at the same Day. *Per Cur'*: The Day is but Circumstance and not material, and no Part of the Issue; a Man is not bound precisely to the Day in his Declaration; and if you force him to vary from it, it is no Departure. *Jud' pro Quer'*.

Thwait's versus Lady Ashfield.

IN Debt for Rent; Plaintiff declares, that certain Houses 5 Mod. 212. Comb. 365. Demands by his Declaration more Rent than was due; on Release of the Overplus may have Judgment for the Residue. in *London* were burnt down by the general Fire; and recites the Acts for Rebuilding the City; and that by Virtue of those Acts, at the Court of Judicature at *Clifford's Inn*, a Lease was decreed to be made to the Defendant of the Premises for fifty-one Years, under the Rent yearly of 53 s. and 4 d. and the Plaintiff avers, that for nineteen Years Rent for the Premises, ending at *Michaelmas* last, there was due to the Plaintiff 58 l. 13 s. and 4 d. *per quod actio accrevit*; Defendants plead *null tiel Record* of the Decree mentioned in the Declaration; Plaintiff prays a *Certiorari* to the Mayor and Aldermen of *London* to bring in the Record, and so it was; moved in Arrest of Judgment, that Plaintiff demanded more Rent than appears by his own shewing to be due; and tho' Plaintiff has enter'd a Release on the Record of the Overplus, yet this will not help it, the Demand being intire. *Northey cont.* He argued, that the eight Pounds being releas'd, the Plaintiff might take his Judgment for what was due; and this is warranted by all Authorities. So in an *Assumpsit* on several Promises, and Declaration was as to some well, as to others ill, Plaintiff may take Judgment for what was well; and there is no Difference between Debt and *Assumpsit*, for the Demand is intire in both; so is *Hob. 178. Stil. 175. and 1 Rol. Ab. 785.* 1 Vent. 49. 1 Rol. Rep. 335. 1 Bull. 155. Vide 2 Lev. 4. *Barber and Pomroy*, which is the Case in Point; and argued further *prout. 1 Saund. 285, 286.* But *Selby* said, this was intire, and in *Hob.* they were several; and the Demand *quod reddat ei* the whole Sum due on all Bonds. *Per Holt*: The *placitum* in that Case was intire, and Demand *quod reddat ei* the whole Sum due on all Bonds; and if one appears not to be due, he shall recover for all the rest; by the same Reason, if Debt be for 100 l. and it appears there is but 90 l. due, upon Release of the odd 10 l. he shall have Judgment *pro 90 l.* and in this Case, if they had gone to Trial, and Jury had found, that but 50 l. 13 s. 4 d. had been due, it had been good. *Barber and Pomroy's* Case is good Law. *Jud' pro Quer'*. But *per me*, if Demand be of less than is due, it will be fatal. *1 Cro. 137, 104.*

After a Trial at Bar no new Trial ever granted, purely because the Jury went against Evidence, except at the End of the last Reign, which was irregular.

B b

D E

D E

Term. Sanct. Trin.

Anno 8 W. III. 1696.

Philips versus Crab.

WHEN the Attornies on both Sides are to attend the Striking a Jury on a Trial at Bar, if one will not attend on due Notice, the Jury shall be struck *ex parte*, and Secondary shall strike twelve for him that does not attend.

Ante p. 87.

Two *Sci' fac'* shall not be taken out both together, for the future the second shall not be taken out 'till the Day of the Return of the first; *Per Cur'*.

In the Common Pleas they have but one *Sci' fac'*, but then there must be fifteen Days between the *Teste* and Return of the Writ; and that returnable too on a common Day, but each Writ is returnable here in eight Days, on a Day certain; so that less Time is here necessary for both, than in the Common Pleas for one.

King and Giles.

Rescue re-
turn'd out of
the Hands of
Bailiffs, good.
Vide Sir T.
Jo. 197.

MOTION to quash a Rescous returned against *Giles*, because said to be *ex custodia Ballivorum*; whereas it should be *ex custodia Vicecom'*, for the Custody of Bailiffs is the Custody of Sheriffs. *Per Cur'*: Both Ways are good, and so has been frequently adjudged.

Pawlett versus Heatfield.

Covenant on three distinct Covenants; several Breaches assigned, one for Non-payment of Rent; Motion that upon bringing in 10*l.* into Court it might be struck out of the Declaration; but Court denied it; for when it appears the Plaintiff has just Cause of Action for one Thing, they will not put him to try the rest at Peril of Costs.

Money not allowed to be brought into Court, on Covenant for Payment of Rent.

Ante p. 90.
Pottea Paich.

10 W. 3. Smith v. Johnson. Mich. 10 W. 3. Lawley v. Dibble. Pasch. 12 W. 3. Farrell's Case.

King versus Walcot.

ERROR to reverse an Attainder of *W.* for Compassing the Death of the King; and Error insisted on was, the Omission of (*ipso vivente*), or (*in conspectu ejus*), in that Part of the Judgment which was *interiora sua extra ventrem suum capiantur & in ignem ponantur*; and the Court gave their Opinion *seriatim*, that Judgment is erroneous. *Eyres*: There are Multitudes of Precedents where *ipso vivente* is mentioned; *Humphrey Stafford's Case*, 1 H. 7. 24. mentioned by *Bro. Cor.* 128. there are some Omissions in that Judgment as reported, but on the Roll it is full in every Particular. So is *Ed. Bohun's Case* in 13 H. 8. *Stow's Chronicles* 513. So is *John Beng's Case*, 3 Ed. 6. Co. En. 699. So is that of *Rob. Dudley*, 1 Mar. Plow. Com. 387. b. *Rast. Ent.* 645. the same in *Stamford's Pleas of the Crown* 182. a. So *J. Littleton's Case*, 43 El. Co. Ent. 422. 3 Inst. 210. and my Lord *Stafford's Case*, by the Advice of all the Judges, it is objected, that *vivens prosternetur* is enough; but to that it may be answered, both one and the other are in the Precedents. 2d Objection, there are some Precedents without it, as that of *David Prince of Wales*, Fl. lib. 1. 16. 2 Inst. 195. but that was a Judgment in Parliament; and if we look into *Cotton's Records*, they increased or lessened the Punishment, in all the Judgments in Parliament, according to the Greatness or Heinousness of the Offence; besides, all Attainders before 29 Eliz. are not to be regarded, there being an Act of Parliament on Purpose to confirm them. *Rookby acc'*. That it is not in the Power of the Judges to add to, or diminish any Part of the Punishment, by making it severer or milder; and

4 Mod. 395.
Salk. 632.
Comb. 369.
Carth. 348.
Vide Dalt. c. 141.
Attainder of Treason reversed for Want of *ipso vivente*, or *in conspectu ipsius*, as to the *interiora*.

Yel. 107.
8 Co. Beecher's
Case.

Postea Mich.
11 W. 3. Dil-
lon v. Walcot.
Sho. Par. Ca.
127.

One Jointe-
nant may di-
strain for the
whole Rent;
but when he
avows, it must
be for Part in
his own Right,
and make Co-
nufance as Bai-
liff for the
rest.
Ante p. 77.

Bailiff, or not,
traverfable in
Replevin.

and if this Judgment should be affirmed with this Omission, we must say in Effect, that all those Judgments wherein this is, are erroneous, and by Consequence must be reversed. *Holt acc'*, 'Tho' the Omission of this Part of the Judgment be for the Benefit of the Party attainted, yet still it is Error, it being a necessary Part of the Judgment; and this is agreeable with the Rules of Law in other Cases, as in Debt on Bond, Plaintiff declares to his Damage, and Judgment given, that Plaintiff should recover his Debt, but no Notice taken of the Damages; tho' this Omission be for the Advantage of the Defendant, he may assign it for Error, because it is a necessary Part of the Judgment. I am confirmed by the vast Number of Precedents in all Kings Reigns, except some old obsolete ones, and a few in King *Charles* the II.'s Time, which were of no great Consequence; and if this be not good, all the Judgments that have these Words must be reversed; for then those Judgments are more severer than the Law allows. And if they are good, this is less severe; and Judgment in all Capital Cases is stated and settled by the Common Law, which no Court can alter; wherefore the Attainder was reversed. This Judgment of Reversal was affirmed in Parliament.

The Question in this Case is, whether one Jointenant may not only distrain but also avow in his own Right, without making any Conufance also, as Bailiff to the other Jointenant; and the Case of *Bowles* and *Poor* 287. has been objected, where Baron distrained for Rent due to the Feme in his own Right only, and adjudged good; but that was because the Right of the Rent was in the Baron only; but here it is otherwise; one Jointenant may distrain for the whole, but when he avows, it must be for Part in his own Right, and make Conufance, as Bailiff to his Companion, for the Rest; and when Judgment is given for a Return, it must be according to the Right of both. *Note*; In the Case of *Trevilian* and *Pine* in *C. B. Pasch. 6 Ann.* it was adjudged, that Bailiff, or not, was traverfable in Replevin.

Hussey versus Jacob.

Salk. 344.
Pleadings.
5 Mod. 170.
Carth. 356.

Action *sur* Case on a Bill of Exchange, setting forth the Custom of Merchants; and that if any Merchant shall draw a Bill directed to another, and he, to whom it is directed,

received, accepts it, that he is become chargeable therewith. That the Lord *Chandos*, using Commerce according to the said Custom, did make and direct a Bill to *A. Jacob* the Defendant, who accepted it, and by Virtue thereof became chargeable. Defendant pleaded the Statute of Gaming; that the Lord *Ch.* and Plaintiff play'd together at Hazard, and that at that Playing Lord *C.* lost to the Plaintiff above one Hundred Pounds at one Sitting; that for this Money so lost, he gave this Bill, which by Force of the said Act is void; Plaintiff demurred, and shewed for Cause that the Plea amounted to the general Issue. And *per Cur'*: 1st, In all Causes where a Man admits the Action, were it not for special Matter, that Matter may be specially pleaded; tho' it may likewise be given in Evidence on the general Issue. 2^{dly}, That in this Case the Acceptor may well plead the Statute in Bar; for tho' the Acceptance makes a new Contract, yet it stands on the former Consideration; and if this Plea should not be good, the Statute would be eluded. Indeed, if the Plaintiff had indorsed the Bill over *bona fide* to another, who was ignorant of the Iniquity, the Statute could not have been pleaded against such an Indorsee: But sure it may against him who is Party to the Wrong. *Jud' pro Def'*.

Bill accepted for Money won at Play, shall not be recovered against the Acceptor, by the Person to whom payable, tho' Indorsee *bona fide*, for a valuable Consideration, would recover. *Postea Mich. 8 W. 3. James v. Fowkes. Pasch. 9 W. 3. Hallett v. Birt. Mich. 10 W. 3. Harrison v. Cage & ux. Pasch. 12 W. 3. Paramour v. Johnson.* In all Cases, where a Man admits the Ac-

tion, were it not for some special Reason, that special Matter may be pleaded, or given in Evidence.

Birt versus Strode.

Comb. 370.

ERROR of a Judgment in *C. B.* in an Action *sur Case*, where the Plaintiff declared, he was lawfully possess'd of a Tenement, and that he ought to have Common of Pasture in 1000 Acres, in a Place called, &c. for all commonable Beasts Levant and Couchant on the Tenement aforesaid; that the Defendant made Conyburrows, whereby the Plaintiff could not enjoy his Common, *in tam amplo & beneficiali modo*. Defendant demurr'd; and *Holt* delivering the Opinion of the Court, that Judgment ought to be affirmed; and that the Declaration was good, without setting out a Title to the Common, either by Grant or Prescription. 1st, Because the Action is brought upon the Possession, and is founded upon a Wrong done upon the Possession, and not to the Title. 2^{dly}, It is not necessary that it appear whether the Defendant be Owner of the Land or not, and therefore no need of setting forth a Title. But if it had appear'd by Pleading, that the Defendant is Owner of the Land, there it is necessary to set out a Title; but here it stands indiffe-

3 Lev. 104.
Geo material.
Vide 1 Cro.
138, 575.
2 Cro. 43.
3 Cro. 419.
1 Vent. 274.
319.

C c

rent

rent whether he be Owner or a Stranger; but when it comes on special Pleading, as in Trespass for Taking and Chasing his Cattle; if the Defendant justifies, as in his Freehold, and that he took them Damage-feasant, there the Plaintiff must shew forth some Title in his Replication, in Answer to that of the Defendant's in his Bar. But in a Declaration, where the Defendant may be as well supposed a Stranger, as an Owner, there no Title is necessary to be shewn. 3dly, This Matter is not traversable, for all the Right of the Common must be given in Evidence upon Not guilty, or else Plaintiff cannot recover; and if so, it is to no Purpose to set it forth in the Declaration; and he said, the Case principally to be relied on is that of *St. John and Moody, Mich. 27 Ca. 2.* in *Hale's* Time, where Plaintiff declared in an Action on the Case, that he was seised of twenty Acres of Wood, and used to have a Way over such a Place to that Wood, and was disturbed in it by the Defendant; he said, it was true, the Plaintiff declared on a Seisin in Fee, but that was not necessary; for a Seisin in Fee is not necessary to set forth, but where a Prescription is to be made: And therefore a Declaration on the Possession, where no Prescription is made, is as good as upon a Seisin in Fee; the Exception to the Declaration in that Case was taken after Verdict, but the whole Court were of Opinion, that tho' there had been no Verdict, yet the Declaration had been good; and there are several Precedents since of this Kind; and Judgment was affirmed.

King versus Granfield.

Words.
Mayor and
Aldermen of
H. are a Pack
of as great
Rogues as any
that rob on
the Highway,
not indictable.

HE was found guilty on an Indictment at the Sessions of *Hertford*, for saying, *that the Mayor and Aldermen of Hertford are a Pack of as great Villains as any that rob on the Highway*; and now having slipt the Time of moving in Arrest of Judgment, they move to submit to a small Fine. *Per Cur:* We are not satisfied the Words are such as they may be indicted for; for what is it to the Government, that the Mayor, &c. are a Pack of Rogues. So they fined them 6 *d.* a-piece.

King versus Bracy & al'.

INDICTMENT for a Riot; Exception was, that the Conclusion ought not to have been *contra formam statuti*, it being an Offence at Common Law. *Per Cur'*: Barretry was an Offence at Common Law, yet it is good to conclude *contra formam diversorum Stat'*. Stabbing was an Offence at Common Law, and therefore a Man may be indicted generally, or specially *contra formam stat'*; and even in an Indictment on the Statute, the Jury find it Manslaughter generally; therefore they refused to quash the Indictment; but bid the Counsel demur, if he thought fit.

Comb. 370.
Indictment for
a Riot *contra
formam stat'*
excepted to,
it being Of-
fence at Com-
mon Law.
Court would
not quash it.

Williams versus Batter & al'.

THE Question was upon a Point of Practice, whether a *Reddidit se* upon one Action, where there were two Actions against the same Parties, where the same Parties were Bail, should be a Discharge to the Bail in the other Action; and the Court of Opinion, that it should discharge the Bail in the other Action too; and the Plaintiff's Attorney having Notice of it, and after taking out Execution against the Bail, the Execution was discharged; and ordered the Attorney should pay such Costs as the Master should tax.

Two Actions
brought a-
gainst a Per-
son, and the
same Bail in
both; a *Red-
didit se* in one,
a Discharge of
the Bail in
the other.

No Man can change his Attorney, without Leave of the Court. In this Court, Oyer of a Deed may be demanded after Imparlance.

Holt: Tho' a Writ of Error be a *Supersedeas* in it self, yet after Execution begun, it shall not hinder it, but the Sheriff may go on, and on a *Fi' fac'* sell the Goods.

D E

Term. Sanct. Mich.

Anno 8 W. III. 1696.

Truelock versus Hartfield.

Salk. 40.
Administra-
tion pleaded
to be granted
by A. Official'
Decani Sarum
istius loci Or-
dinar' cui ad-
ministratio de
jure pertinuit,

DE B'T on a Bond as Administrator; the Plaintiff in his Count says, that Administration was committed to him *per J. S. Official' Decani Sarum loci illius Ordinar' legitime constitut' cui administratio de jure pertinuit*, without saying *ad tunc pertinuit*; he does not say *coment constitut'*, and held good notwithstanding, without saying *ad tunc*, & *quomodo constitut'*, good.

Dickson versus Willows.

Money.

HOLT: Guineas are coined at the King's Mint for 20s. and at that Rate are lawful Money of *England*, without any Proclamation for their Currency; the Indentures between the King and Master of the Mint are sufficient.

Hicks versus Dowling.

Salk. 19.
Case, for neg-
ligently keep-
ing his Fire,
lies for Lessee
against his
Under-Lessee.

ACTION *sur* Case for negligently keeping his Fire, by Lessee against Under-Lessee. *Per Cur'*: It lies, because the Lessee is answerable over to his Lessor. 3 Cro. 461. *Ferry and Lowgar.*

Lee versus Brace.

TRESPASS and Ejectment; Special Verdict, that *W. Brace*, Carth. 343: feis'd in Fee of the Lands in Question, did infeoff 5 Mod. 266. *J. S.* in Fee, to the Use of the Feoffor for Life; and after Pleadings. his Decease, to the Use of *T. Brace* his Son, and his Heirs Conveyance by Way of for ever; and for Want of Issue of his Body, to the right Use, to be Heir of the Feoffor; and the Question was, whether *T. B.* construed: according to the Intent. had a Fee or a Tail: And *per Holt*, the Intention of the Party is to pass only a Tail; and that contradicts no Rule of Law; for the Law requires the Word *Heirs* to make a Fee-tail, as well as a Fee-simple; and the Generality of those Words may be qualified by subsequent ones; and the Words, *for Default of such Issue*, shew what Heirs he intended, as much as if he had said to one and his Heirs, *to wit*, the Heirs of his Body. *Adjourn* in 5 Mod. Judgment that it is only Tail.

James versus Fowks.

ASSUMPSIT against a Feme, who pleads Coverture *tempore promissionum*; Plaintiff demurs, because it amounted to the general Issue. *Per Cur'*: Where it is Matter of Law Ante p. 97. Postea Pasch. 9 W. 3. Hall-let v. Birt. Mich. 10 W. 3. Harrison v. Cage & ux. Pasch. 12 W. 3. Paramour v. Johnson. Matter of Law, which amounts to the General Issue, may be pleaded, or given in Evidence.

Fuller versus Smith.

ERROR *è C. B.* Trover against ten, wherein the Plaintiff declares of a Finding by ten, and a Conversion by nine, and Judgment against all ten. *Per Cur'*: The Conversion is the Gift of the Action; for if a Man find Goods, it is lawful for him to take them, wherefore it must be certainly Error; but if you get it amended in the Common Pleas, we will get it amended here.

Trover against ten; and declares of a Conversion by nine, and Judgment against ten, ill; for Conversion is the Gift of the Action.

Blackhall versus Eccles.

5 Mod. 285.
Carth. 389.
In Trespass
for Assault,
and a Time
laid in the
Declaration,
which was af-
ter the Ver-
dict, 'tis cured
by the Ver-
dict.

Ante p. 92.
Postea p. 105.

TRespass for Assault and Battery, and declares for a Bat-
tery 1 die Feb' anno 8 Reg' nunc, which is not yet
come; and this was moved in Arrest of Judgment. *Northey*
for the Plaintiff acknowledged, that if the Time in the De-
claration had been after the Bill filed, and before the Trial,
the Judgment must be arrested; because then it would have
appeared the Jury gave Damages for an Action arising since
the Suit commenced; but in this Case, the Time being
after the Trial, 'tis as if there were no Time at all, it be-
ing impossible, and therefore holpen after Verdict: *Sorrell*
and *Lewin's Case*, Mich. 26 Car. 2. the same with this;
where an *Assumpsit* was laid of a Time not come. *Per*
Cur': The Day alledged is no Day at all; the Time is
but a Circumstance, and therefore *Jud' pro Quer'*. Vide
105. *Wall* and *Dukes*.

Duncomb versus Church.

Salk. 1.
Comb. 390.
If it appears
in Pleading
that a privi-
leged Person
is actually in
Custody, he
cannot have it.
Postea Hill. 8
W. 3. Bands
and Bodiner,
and Stones and
Bodiner.

PER Holt: A privileged Person in the Common Bench
may be in Custody of the Marshal; for he may either
wave or misplead his Privilege; and if he be actually in
Custody, and it appears so by *Pleading*, he cannot have his
Privilege: And if one plead an exempt Jurisdiction from all
the Courts of *Westminster*, and not to be sued but in such
particular Courts and Franchises, there you must shew that
they have a Jurisdiction of the Matter, and that the Cause
arises within their Jurisdiction.

Special Imparlance should not be allowed, without the
Leave of the Court, or Consent of Parties.

King and Keat.

5 Mod. 287.
Bail not al-
lowed in Man-
slaughter till
Clergy had.
Postea Hill. 8 W. 3. *Armstrong v. L'Isle*.

THE Court refused to bail him, he being found guilty
of Manlaughter; for that they could not bail him
till Clergy had, according to *Buckler's Case* in *Style*.

Brent

Brent and Sir Henry Edwin.

THE Plea of *Non assumpsit infra sex annos* is a special Issue.

Oldham versus Pickering.

Attachment *sur Prohibition*; the Case was, *Tho. Oldham* was feis'd of a Messuage to him and his Assigns for three Lives, dies Intestate without Children, having only *Anne Pickering* his Sister; Administration was committed to *Sarah Oldham* the Plaintiff, whom the Defendant sued in the Spiritual Court for Distribution; and the single Question was, whether an Estate *pur auter vie* be now distributable in the same Manner as Intestates Goods and Chattels, according to 22 *Ca. 2.* by Force of 29 *Ca. 2. c. 3.* whereby it is enacted, that an Estate *pur auter vie* shall be deviseable; and if no such Devise be thereof made, the Estate shall be answerable in the Hands of the Heir, if it shall come to him by Reason of a special Occupancy; and in case there be no special Occupant, it shall go to the Executor or Administrator of the Parties, that had the Estate thereof by Virtue of the Grant, and shall be Assets in their Hands; and adjudged *per Holt, Rookby, Turton and Eyres*, that the Prohibition should stand; and that an Estate *pur auter vie* of an Intestate was not distributable; for notwithstanding this Alteration by the Statute, it remains a Freehold still; and the Amendment of the Law in this Particular was only designed for Relief of Creditors, that if it came to the Heir, by Reason of special Occupancy, it shall be in his Hands as Assets by Descent, that is liable to those Debts where the Heir is chargeable, and those only; but if there was no special Occupant, then it shall go to Executor and Administrators, and they shall be in the Room of the Occupant, and it shall be Assets in their Hands for the Payment of Debts; but it is not Assets to pay Legacies, except such as are particularly devised out of it; the Statute only having made it Assets for a particular Intent, to pay Creditors: So as no Debts appearing in this Case, the Administrator is as it were the Occupant, and shall not be compelled to make Distribution.

Salk. 464.
Comb. 90,
388, 475.
Carth. 376.
Estate *pur auter vie* is only Assets in respect of Creditors; and not chargeable with Legacies, unless thereout expressly given; and the Executor or Administrator, if no Debts, will be Occupant, and not distributable.

Nelson

Nelson versus Hawkins Dean of Chichester.

Calling a Clergyman *Knave*, not suable in Spiritual Court.
 Postea Mich. 10 W. 3.
 Coxeter and Parson.

ATtachment *sur* Prohibition; in this Case the Plaintiff declared, that the Defendant libell'd against him in the Spiritual Court for Calling him *Knave*; whereon the Defendant demurr'd; and *per Holt*, it will be hard to grant a Consultation; the Party has not accused the Dean of any Dishonesty in his Profession, which may make him liable to Ecclesiastical Censures; if he had so done, it would have been reasonable to let him sue there; but now the Case is only, whether we must be more tender of the Reputation of a Clergyman than that of another Man; for which there is no Reason. The Reason why laying violent Hands on a Clergyman, in the Ecclesiastical Court was punished by Excommunication, was, because he having *habitus & tonsuram*, by which he was known to be such, an Assault on him was deem'd an Assault to the whole Clergy; and so a Kind of Spiritual Offence. And in *Hill*. Term the Court gave Judgment *quod stet prohibitio*.

Lindsey versus Clerk.

Capiatur taken away in Trespass.

THE *Capiatur* in Trespass is wholly taken away by the Statute; therefore the Judgment now should be enter'd, omitting *quod Capiatur*. *Per Cur'*.

King versus Gluff.

Where a Statute prescribes that a Thing shall be by Bill, Complaint or Information, cannot be by Indictment.

4 Inst. 165.

Indictment before Commissioners of Oyer and Terminer at the Old Bailey, and removed on *Certiorari* on the 1 & 2 P. & M. c. 7. for selling Haberdashers Wares contrary to the Statute, on Pain of Forfeiture, one Moiety to the King, the other to him that will sue for the same in any of the King's Courts of Record, by Bill, Complaint, Information or otherwise; and moved by *Northey* to quash it on the Authority of *Gregory's Case*, 6 Co. 19. b. and *Farrington* and *Keymer*, 1 Cr. 112. because the general Words, of the King's Courts of Records, extend only to those of *Westminster*. *Per Cur'*: It is true, the Justices of Peace cannot hereby have Jurisdiction, but it hath been ruled since *Gregory's Case*, that Justices of Oyer and Terminer may by Way of Indictment,

but not by Way of Information, and therefore in that Respect it is well enough; but here the Statute hath prescribed a particular Way for the Recovery of the Forfeiture, viz. by Action of Debt, Information, &c. without saying any Thing of Indictment; and therefore it is a Question, whether this be indictable or no; for which Reason let it be quashed, *nisi*.

Wall and Dukes.

Trespas; Verdict *pro Quer'*; moved in Arrest of Judgment, because the Trespas was only laid to be *diversis diebus & vicibus*, without laying any particular Time. *Per Cur'*: It is well enough after Verdict, on the same Reason with *Blachalls* and *Eccles* Case this Term. *Ante* 102.

Laying no particular Time in Trespas cured by Verdict.

Per Holt: An *Audita querela* is no *Supersedeas* in it self, being not like a Writ of Error; but the Party may go on with his Execution 'till there be a special *Supersedeas*; and tho' *Audita querela* be allowed, no *Supersedeas* shall be granted 'till the Matter, whereupon the *Audita querela* is grounded, be proved by two Witnesses.

Audita querela is no *Supersedeas* 'till there be a special *Supersedeas*; which shall not be granted 'till the Matter be proved by two Witnesses.

Hartop versus Holt.

Judgment was given in Debt in this Court, and affirm'd in a Writ of Error in *Cam' Scacc'*, and sent back hither. Then goes out a *Sci' fa'* why Execution should not be awarded on the Judgment, and thereupon Execution is awarded; and after *Holt* brings a Writ of Error *tam in re-ditione judicii, quam in adjudicatione Executionis*, returnable in the Exchequer Chamber; notwithstanding which Plaintiff takes out Execution; and the Question was, whether this Writ of Error be a *Supersedeas*. *Holt*: It is plain no Writ of Error in this Manner lies of the first Judgment; and if such a one be taken out, it is no *Supersedeas*; because one hath been brought already on the first Judgment, and they have affirmed it, whereby they executed their Authority, and have no Power to examine their own Judgment; so that supposing this Writ of Error to lie on the *Sci' fac'*, yet it will not lie on the principal Judgment, or be any *Supersedeas* thereunto: But then supposing it to lie on the *Sci' fac'* alone, whether it would be good for that Part and

Comb. 393.
5 Mod. 229.
Salk. 263.
Error will not lie in the Exchequer Chamber, on *Scire facias* to execute a Judgment which had been affirm'd in the Exchequer Chamber.

E e

void,

Vide 1 Vent.
168, 169

Postea Hill.
8 W. 3. Co-
niers v. Ma-
nucapt' of
Rawlins.

1 Cro. 143,
464.
1 Vent. 38.

void for the rest; so the whole Question is, whether a Writ of Error lies upon an Award of Execution in a *Sci' fac'*, grounded upon a Judgment in the Exchequer Chamber. I think this Writ of Error will not lie, and is no *Superfedeas*; because it is neither within the Letter nor Meaning of the Act, being for a Matter arising since the first Judgment, and nothing relating to the Merits of that; wherefore the Court assented that no Writ of Error lies on this *Sci' fac'*, and that Execution was well taken out. *Nota diversitatem 1 Vent.* 168, 169.

Byron versus Emes.

Saying a Woman had a Bastard to hinder her of her Marriage, which was then in Communication with A. not actionable. Salk. 693. Comb. 391.

ACTION on the Case for scandalous Words, wherein the Plaintiff declared she was a chaste Virgin, and of good Fame; and that whereas *J. Chapman* was in Communication of Marriage with her, the Defendant *præmissorum non ignarus*, to defame her, and hinder her of her Marriage, said of her, *what do you go to London for, but to drop your Stink*; with Averment, that where the Words were spoke *Stink* signifies *Bastard*; as also, *that she went to London last Winter to lie in, and to my Knowledge several People have lain with her*. Upon Issue joined, and Verdict for Plaintiff, it was moved in Arrest of Judgment, that the Words are not actionable, because they are of a Spiritual Conufance, and no Temporal Loss accrues; that to say a Woman has a Bastard, was never actionable before the Statute for Provision of Bastard Children; and since the Statute, it has never been held to be actionable, but where the Party is brought within the Penalty of the Statute, which is only where the Bastard becomes chargeable to the Parish. These Words are most scandalous of a young Woman; so that were it *res nova*, perhaps Action would lie, but there are many Authorities to the contrary. It is a Crime, of which the Ecclesiastical Court has Conufance, and can Censure; and it is not reasonable that the Party should be liable to Defamation and an Action too, on which Account *Anne Davis's* Case hath been often shaken. In this Case, the Having the Bastard is not the Crime, but the Fornication, of which the Party is an undeniable Evidence. *Jud' pro Def'.*

I

Yeoman

Yeoman versus Bradshaw.

PER Cur': The whole Question is, whether a Bill of Exchange shall draw Administration to the Province, or Dioceses where the Bill is, or where the Acceptor, who is obliged to pay it, lives. Now tho' a Bill of Exchange be in Writing, yet in Judgment of Law it is of no higher Nature than a simple Contract; and therefore it must follow the Rules of Debt upon simple Contract, and Administration is to be committed where he who pays it lives. *Jud' per Cur' quod billa cassetur.*

Carth. 373.
Comb. 391.
Bill of Exchange only simple Contract; and only Assets where the Debtor is, and Administration to be granted accordingly.

White and Bishop of Worcester.

TRespass and Ejectment against seven Defendants, who all appeared and pleaded, and joined Issue on the Plea-Roll; the *Jurat'* and *Distringas* was against all seven, only the Issue on the *Nisi prius* Roll was joined by five only; Verdict at the Assizes against seven; and after several Motions in Arrest of Judgment, it was resolved by the whole Court, that the *Nisi prius* Roll was in this Case amendable. *Blackamore's* Case has these express Words, *That the Nisi prius Roll is amendable, where the Judge has sufficient Authority, express or implied, to try the Cause.* 8 Co. 161. Now then here the Judge hath an implied Authority, for here is an Issue joined on the Record by all seven; if one Issue had been joined by the five, and another by the other two, it had been otherwise: The *Jurata* and *Distringas* are against all seven to try this Issue of Not guilty; so that the Judge hath plainly an implied Authority to try the Issue between the Plaintiff and the seven; and that Omission is plainly a Misprision of the Clerk; and therefore such a Mistake in all Actions and Cases is amendable; and especially in this Action of Ejectment, where all seven are bound by Rule of Court to confess Lease, Entry and Ouster.

Comb. 393.
Ejectment against seven, who appeared and pleaded, and join'd Issue on the Plea-Roll. The Issue on the Plea-Roll only against five, Verdict against seven; the *Nisi prius* Roll is amendable.

King and Sir Tho. Culpeper.

Privilege of
Parliament
does not pro-
tect a Man,
where Security
of the Peace
is desired. 2.

AT a Trial at Bar, wherein Mention is made of Privilege of Parliament; *Holt* said, that whereas it is said in our Books, that Privilege of Parliament was not allowable in Treason, Felony, or Breach of the Peace, that it must be intended where Security of Peace is desired, that it shall not protect a Man against a *Supplicavit*; but it holds as well in Case of Indictments, or Informations for Breach of Peace, as in Case of Actions.

King versus Rainsden.

Order of Ju-
stices to re-
move a Man,
not saying one
of them was
of the *Quo-
rum*, ill.

AN Order of two Justices, to remove *Rainsden* likely to become chargeable to the Parish, was quashed, because it was not said, that one of them was of the *Quorum*; but if it had been at Sessions, it need not to have been said.

Armstrong versus L'Isle.

Ante p. 102.
Till Clergy
had not bail-
able in Man-
slaughter.

PER *Holt*: We cannot bail *L'Isle* on a Conviction of Manlaughter, before Clergy had, unless a Pardon be ready to be produced *sub pede sigilli*, and then we may, tho' attainted of Murder, or Treason; and so on a Writ of Error to reverse an Attainder, we may bail him, and bind him to prosecute a Writ of Error.

D E

Term. Sanct. Hill.

Anno 8 W. III. 1696.

Redwood and Coward.

ERROR out of the Palace Court in an Action on the Case; Error assigned, that *Furatores assident damna*, where it should be *assidunt*; and the Court adjudged either of them well enough, tho' neither of them proper. *Per Holt.*

Armstrong versus L'Isle.

APPEAL of Murder; Appellee was brought to the Bar, and it was moved, that he might have his Clergy, on his Conviction of Manslaughter, on an Indictment whereon he was tried last Assizes for *Cumberland*; & *per Holt*, there have been Resolutions, that the Judges may defer the Allowance of Clergy to a Prisoner to expose him to an Appeal. In the Case of *Goring* and *Deering*, the Prisoner was convicted of Manslaughter; Clergy respited; an Appeal brought; he pleaded all this Matter, but his Plea was disallowed, by Advice of all the Judges. And I tried him on the Appeal; but I must confess I was never satisfied with that Resolution, being of Opinion, that it is the Duty of the Court to allow the Prisoner his Clergy, the same Assizes or Sessions wherein he is convicted.

The Clergy in the Time of *Ed. 3.* complain'd, that after Clerks were convicted of Felony, the Judges delayed the giving them their Clergy, on Suggestion, that there were other Matters against them; which they might do on this

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Account;

Comb. 410.
Ante p. 102.
Appeal lodg'd
against *A.* con-
victed of Man-
slaughter, but
not prosecu-
ted; he was
bail'd before
Clergy had.

Account; because 'till 23 H. 8. Clergy was allowed in all Cases except Treason. And if a Man had his Clergy once, the Delivering him over to the Ordinary was an absolute Discharge of all Offences before Clergy had; but notwithstanding this Reason, they complained thereof; whereupon 25 Ed. 3. c. 5. was made, which stands unrepeal'd; whereby it is enacted, *that a Clerk shall be presently arraign'd for all his Offences, or otherwise delivered to the Ordinary*; where by the Word *presently* is meant, the same Sessions or Assizes, (*i. e.*) the Party shall have his Clergy the same Sessions, &c. wherein he is convicted. Now then, if by this Statute the Party must have his Clergy the same Sessions he is convicted, and you have lodg'd an Appeal, you may go on herewith; but if you will not go on, you must not delay him of his Clergy: The 3 H. 7. c. 1. provides, that *Auterfoits convict* shall be no Bar in an Appeal, unless Clergy had; the Design whereof was to save the Right of the Church, by which the Having of Clergy was a Discharge, not only for the Offence for which he was convicted, but also for all other Offences before; so that Having of Clergy on Conviction of Manslaughter was a Discharge of an Indictment for Larceny, or other such Crime. Before the Statute of 18 El. if a Man was guilty of two Felonies, in one whereof he might have had his Clergy, in the other not, and he had his Clergy in one before he was arraigned of the other; the other was hereby discharged; for Remedy of which that Statute was made. *Stone's Case* in Dy. 214. b. which obscurely reported is remarkable in this Case; *Stone* had committed two Felonies, in one whereof he might have his Clergy, in the other not; he was first indicted of the Felony where Clergy lay, and convicted, and had Clergy, but no Entry made of his being delivered to the Ordinary; and next Sessions he was convicted of the other Felony, but Judgment respited; and Advice of all the Queen's Judges and Serjeants was taken, whether he should have Judgment to be hang'd, or delivered to the Ordinary; but that being not done, they were divided seven against seven; but at Length the Opinion of the latter seven prevail'd, that he should not be hang'd, because if he had had his Clergy, it would have been a Discharge of all other Felonies committed by him before that Conviction; and the Delay thereof being the Act of the Court should not turn to his Prejudice. Now I think a Man, notwithstanding his being found guilty of Manslaughter, may be appeal'd the same Sessions before Clergy had; but to make no Determination

in this Point, we are to consider now, whether he may be bail'd. *Co. Ent.* Title *Indictment*, there was an Indictment at the Assizes for Murder, the Party found guilty of Manslaughter, the Conviction removed into this Court, where he was bail'd; wherefore *per Holt & totam Cur'*, let him be bail'd; and after his Clergy was allowed him, for the Reasons before given by *Holt*.

Per Holt: If you have not regular Notice of Trial, yet if you make Defence, and do not depend on that, you cannot after take Advantage of it.

Hicks and Woodison.

Attachment on a Prohibition; wherein the Plaintiff declared, that the Hundred of *Huntspittle* was an antient Hundred Time out of Mind; and that within the Hundred, Time out of Mind, there had been a Custom, for all the Inhabitants thereof to be free and discharged from the Payment of any Tithes for the Agistment of Barren Cattle. Defendant traversed the Custom; Issue join'd, and Verdict for Plaintiff, that there was such a Custom; and moved in Arrest of Judgment, that there can be no such Custom *in non decimando* for any Thing but Wood, because that is not due of common Right; and adjudged, that no Country or Hundred can prescribe in a *Non decimando* for any Thing that is tithable of common Right; and that this Prescription is void and illegal. There is no Instance of such Prescription, but of Wood, but one, 1 *Rol. Abr.* 654. *Kidden and Edwards*. Wood was only tithable by particular Custom till the Canon of *Stradford*, 17 *Ed.* 3. because it is not annually renovant, (*i.e.*) not producing annual Profit; wherefore Consultation was awarded.

4 *Mod.* 336.
Salk. 655.
Par. Ca. 192.

King versus Burdett.

IF the Jury eat and drink at the Charge of the Party for whom the Verdict is found, it avoids it; but if at their own Charge, they are only fineable.

Vide 2 *Cr.* 21.
1 *Vent.* 125.

Holt: The Sessions cannot indict for Petty Treason.

Tho'

Tho' the Commission of Bankruptcy be taken out of Chancery, and you must apply there for superseding it, yet all Misdemeanors in the Executing it are conusable here.

Coniers versus Manucapt' of Rawlins.

Bail pleads
Payment be-
fore the Re-
turn of the se-
cond *Sci' fac'*,
and ill; for
the Recogni-
zance is broke
before suing
the first *Sci'*
fac'.

Postea Mich.
10 W. 3. The
King v. Moor.
Mich. 13 W. 3.
Dom' Rex v.
Love.

1 Cro. 464,
143.
2 Cro. 171.
1 Vent. 38,
169.
Cro. Car. 300.
Hob. 72.

SCIRE fac' against Bail; they come in and plead, that before the Return of the second *Sci' fac'* the Defendant in the original Action paid the Money; to which the Plaintiff reply'd; and instead of the Defendant concluding to the Country, an Issue being tender'd, concluded with an *hoc paratus est verificare*; whereupon the Plaintiff demurr'd. *Per Cur'*: Bail may plead Payment by Principal; but it must be in a right Manner, which is not done in this Case, because the Recognizance was broke before the Suing the first *Sci' fac'*; and therefore pleading Payment before the Return of the second has not a Colour of a good Plea. Whereupon *Shower* urg'd, that the Plaintiff could not have Judgment; because he prays Execution *de debito & damnis*, whereas it should have been *de damnis* only; for the Recognizance in the King's Bench being not in a Sum certain, there can be no Debt created in the Bail thereby. *Per Cur'*: We will reject *de debito* as Surplusage; wherefore let Plaintiff have Judgment; after which Defendant brought a Writ of Error returnable in *Cam' Scacc'*; but on Motion Plaintiff had Leave to take out Execution; for no Writ of Error lies on a *Sci' fac'* against Bail there. *Ante* 106.

Anonymus.

Inquisition be-
fore a Coro-
ner, *certe cre-*
dimus ill,
should be
certain.

SIR Bartholomew Shower moved to quash an Inquisition taken before a Coroner, whereon the Jury find, that a Post in the Highway was *unica causa movens ad mortem*; and he excepted to it, because it was *Nos certè credimus esse causam mortis*, whereas it ought to be certain; and therefore it was quashed.

Bands and Bodiner; and Stone and Bodiner.

Carth. 376.
Privilege of
Attorney.

TROVER; Defendant pleads he was an Attorney of the *Com' B.* and so pleads his Privilege. Plaintiff replies, that at the Time of Exhibiting the Bill he was in
I *Custodia*

Custodia Maresch' at the Suit of *J. S.* and that the Defendant was delivered out upon Bail; *super quo* the Plea between them not being determined, Plaintiff according to the Custom of this Court, 'Time out of Mind, filed his Bill, as it was lawful for him to do; whereupon the Plaintiff demurr'd. And *per Cur'*, the being in Custody of *Maresch'* does not hinder a Man of his Privilege: The Court indeed in 27 *H. 6. 6.* were of Opinion, that if he be actually in Custody of *Maresch'*, he cannot be sued in any other Court; and if he be, a *Supersedeas* shall go; but this was only for the Privilege of the Defendant. The only Privilege, which Plaintiff has, is just to sue him while he is there; but if Defendant has Privilege not to be sued there, he may have the Advantage thereof. In this Case, it does not appear but that the Defendant may have Privilege against him who first brought him into Custody of the *Maresch'*; and if so, it is strange he should not have it against the Plaintiff that grafts thereupon: If indeed he had submitted himself in the first Action, to the Jurisdiction of the Court, he should not have his Privilege in the other; but then you must have shewn it in your Replication, and relied upon it as Matter of Estoppel; which having not done, we must allow Privilege.

Being in Custody of the Marshal on Bail filed, unless in actual Custody, does not hinder an Attorney of his Privilege. *Postea Trin. 13 W. 3. Wilbraham v. Lownds.*

Ante p. 102.

Ejectment on a Demise by a Corporation aggregate; Verdict *pro Quer'* in *C. B.* Error brought, and objected, that the Demise is not set forth to be by Deed; *Jud' affir'*; for Demise is confess'd to be good by confessing Lease, Entry and Ouster; and Jury could never have found for Plaintiff, if there had not been good Demise.

Ejectment. By confessing Lease, Entry and Ouster, the Demise is confess'd to be good.

King versus Shaw.

Mandamus to restore *Shaw* to the Place of one of the Burgesses of *Wilton*; and after Argument on both Sides, a peremptory *Mandamus* was granted; because the Crime, for which they remov'd, was not well alledged in the Return.

Mandamus. If Crime for which a Person is removed is not well set forth, peremptory *Mandamus* shall go.

King versus Clerk.

H*AB'* Corpus to the Keeper of *Newgate* to bring up the Body of *J. C.* committed for not taking upon himself Court of Aldermen, returned to be to the Keeper of *Newgate*; not good, without saying that he was an Officer of the City. Ante p. 75.

Comb. 411. A Commitment by the

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self the Livery of the Vintners Company; and Keeper of *Newgate* return'd, that City of *London* is an antient City, and that Time out of Mind there have been several Companies, Guilds and Fraternities within the City, among the rest the Company of Vintners; and that they had Time out of Mind used to chuse out of the Freemen certain Persons, who were to take upon them the Livery of the said Company; and that there has been, Time out of Mind, a Court held before the Mayor and Aldermen of that City; which Court has the Government of all Companies; and that upon Complaint made before them, by the Master and Wardens of any Company, of any Person duly chosen on the Livery that did refuse, &c. that the Court of Aldermen used to commit such Persons so refusing to the Sheriff, or some other Officer of the City, *quousque consentiret & declararet*, that he would take upon himself the said Office, or otherwise be discharged by due Course of Law. That *Cl.* was duly chosen a Liveryman, &c. and that the Court of Aldermen, by a Warrant in Writing, did commit him to me, the said Keeper of *Newgate quousque*, &c. *Per totam Cur'*, the Custom is good. But because it did not appear on the Return, that the Keeper of *Newgate* was an Officer of the City, to which the Commitment must be, according to the Custom, therefore he was discharged. And *Holt* took this Diversity, that where it appears that the Person, to whom the Commitment was made, was an Officer of the Court, as the Marshal here, or the Sheriff, in Case of Commitment by Justices of Oyer and Terminer, there needs no Averment of such a Person to be a proper Officer: But here it does not appear, that the Keeper of *Newgate* is a proper Officer for the City of *London*, attendant on that Court; we know the Sheriffs of *London* are Keepers of *Newgate*, and that all Persons in Custody of Keeper of *Newgate* are in Custody of Sheriffs; but we cannot judicially take Notice of it. So on the Statute of Recusants, which forbids a Recusant convict to come within five Miles of *London*, which sends Members to Parliament; and the Commitment was for coming within five Miles of *London*; and it not appearing that *London* sent Members to Parliament, on the Return, the Return was ill, and Party discharged; tho' every one knows *London* does send Members to Parliament.

Vide Postea
Pasch. 13
W. 3. Wil-
mot v. Tiler.

King verlus Bernard.

Indictment at the Sessions of the Town of *Southampton*; Skin. 669. that at the General Quarter-Sessions for the Town and County of *Southampton*, Sept. Tho. Bernard of the City, Grocer, then and there resident, was by the Mayor, Bailiffs and Burgeses of the said Town, *debito modo secund' consuetudinem villæ electus* to be Constable for the Year ensuing, whereof he had Notice the 4th of *October*, and *ad tunc & ibidem requisit' fuit*, by two Justices of the Peace, *ad præstand' Sacramentum Officii sui prædicti*; but that he not minding his Duty *prædicto quarto die Octob', usque ad diem exhibitionis hujus billæ*, obstinately refused to take upon himself the said Office. Defendant demurr'd; 1st, Because by Common Law Constables were only chosen by Leets, and in Default of them, at the Turn; and if there be a Custom in a Corporation to chuse them otherwise, it must be averred, that they had such a Custom immemorial; it not being sufficient to say *debito modo secund' Consuetudinem*. 2dly, Supposing such a Custom in a Corporation to chuse them otherwise, it can only bind the Members, and not others; and therefore they should have averr'd Bernard to have been a Member. 3dly, Supposing him to be duly elected, it doth not appear but that he took upon him the Office; for Notice of his Election and requiring to take on the Office was on the 4th of *October*, and the Refusing is laid to be on the *quarto die Octobr'* too.

Per Cur': The last Objection is material; for he might have taken the Oath the 4th of *October*, which would have been an Assumption of the Office after which he is only indictable for a special Neglect, (*i. e.*) the Neglect must be specially laid. As for the second; supposing such a Custom within a Corporation, they may without Doubt not only meddle with their own Members, but also with the Residents within their Precincts. But the first is most considerable. At Common Law they were elected at the Leets, and in Default, at the Sheriff's Torn, the Leet of the County. But by Custom, a Corporation might chuse its own Officers; and this Custom was reasonable, because when an incorporate Town hath the Government thereof committed to them, it is but reasonable they should chuse their Officers that are necessary to secure the Publick Peace; but then it should have been particularly set forth, which is not done here. Judgment *ideo pro Def'*.

King

Comb. 416.
Constables at
Common Law
are to be e-
lected in the
Leet, and in
Default there-
of at the She-
riff's Torn.
By Custom a
Corporation
may elect
them, but
that must be
by Custom,
which must be
specially
shewn.

Vide 8 Co.
38. a.

King versus Morgan Rees.

Comb. 417.
 Carth. 393.
 5 Mod. 325.
 Churchwarden chosen by the Parish cannot be refused, and being appointed by the Parish that is answerable for him.

M *Andamus* to the Archdeacon of *Cardigan*, to swear *Morgan Rees* Churchwarden, setting forth a Custom therein by the Parish to chuse a Churchwarden, and that according to the Custom they had chosen, &c. Archdeacon return'd, that they had such a Custom, and that *Rees* was lawfully chosen; but that it was proved in the Archdeacon's Court, that he was a poor Dairy-Man, and Servant; and that he had no real Estate, or personal one, and was unfit for the Office, and that therefore they discharged him; and then he certifies to the Court, that being *Pauper lactarius & servus*, and *minus habilis & idoneus ad exequendum Officium præd'*, he could not swear him. And *per Cur'*, a peremptory *Mandamus* was granted: And *per Holt*; he is a Temporal Officer, and the Goods of his Parish are in his Custody, and he may have Trespas for them; and they are by Law a Corporation: The Parishioners may trust whom they please, if he be insolvent, but it is at their Peril. The Canon says, the Minister shall chuse one, that is only by Custom where they have so done; and the Canon only confirms that antient Usage, and that was at first by some Composition.

Per Holt: If a Record comes here out of the *Marshalsea*, you cannot have Execution larger than the *Marshalsea*; but if by Writ of Error, you may have Execution on the Affirmance of the Judgment all over *England*.

Hooper versus Pierce.

Comb. 418.
 Award of all Matters to the Time of the Award, good.

DEBT upon a Bond to stand to the Award of two; and if they could not agree, to nominate an Umpire; and Submission was of all Actions, Suits and Demands to the Time of Submission. Defendant pleaded no Award made; Plaintiff in his Replication sets forth an Award made by the Umpire, *viz.* that they should mutually release all Demands to each other to the Time of Umpirage, and assigns a Breach: Defendant demurs; and it was objected that this Award was void, because Releases are appointed to be made of a Time out of the Submission. *Sed per Cur'*: 'Tho' antiently such an Opinion might have obtained,

tain'd, yet for a long Time such an Award has been held good; and that for two Reasons; 1st, It shall not be intended, unless the contrary be shewn, that any other Matter arose between the Submission and the Making the Award; and if no Matter did arise, the Arbitrator has awarded no more than he should do; and since that a second Reason has been added, that supposing other Matters to have arisen, yet as to that the Award is void; the general Words being to be expounded of all Matters in Controversy at the Time of the Submission, and as to other Matters arising since to be void; and if in such Case the Party submitting to the Award should make a Release to the Time of the Submission, it would be a good Performance of the Award. *Jud' pro Quer'.*

Ante p. 8.

King versus Turnock.

INDICTMENT for an Offence *ad Generalem Sessionem*, without saying *Generalem Quarterialem*, in a Case where the Statute appoints it to be at the General Quarterly Sessions; and quash'd.

Where a Statute appoints an Indictment to be *ad Generalem Quarter Sessionem* is ill.

King versus Comit' Ailesbury.

EARL of *Ailesbury* moved to be bail'd, and several Reasons urged by Counsel; but they bail'd him by Virtue of the discretionary Power the Court has, without any Regard to its being in or out of the *Habeas Corpus* Act; but considering the Length of his Imprisonment; his Indisposition of Body; and that *Goodman*, who was sworn to be a material Evidence against him, was here in *England* several Months after my Lord's Imprisonment; and that during all that Time he was neither indicted nor prosecuted.

Person bail'd by discretionary Power of the Court. Vide ante p. 66. Comb. 421.

Gale versus Ewer.

LIBEL by a Parson in the Spiritual Court on the Statute of 2 *Ed. 6.* for not setting forth of Tithes; consisting of various Articles. Defendant not appearing was

Tithes. 2 Ven. 48. Comb. 128. Carter 143. It is not necessary to give the Parson Notice of Setting out of Tithes.

excommunicated for it, and now pray'd a Prohibition; because one of the Articles was for not giving Notice of the Setting out of Tithes. *Per Cur*: Let it go; because a Parishioner is not bound either by Common Law or Statute to give the Parson Notice of the Setting forth; and so went *quoad extraponendo Decimas*.

King versus Keat.

5 Mod. 287.
Comb. 406.
The Arguments of this Case, but no Resolution.
Indictment for Murder, he not having first struck, without saying any Thing of a Weapon drawn, ill.

WE have consider'd of the Fact, and the whole Record; and as to the Indictment on the Statute of Stabbing, that is apparently vicious; for the Indictment is, that he drew his Sword and stabb'd *James Wells*, he not having first struck, without saying any Thing of a Weapon drawn, and concludes *contra formam Stat'*; for which Reason let it be quashed. Then as to the Indictment of Murder at Common Law, it is Nonsense in the Beginning; for it says, that the said *J. K.* made an Assault on *James Wells*, and the said *J. Keat præfat' Jacobum Wells* with a certain Sword of the Value of 5 s. which he the said *J. K.* in his right Hand had and held, *præfat' Jacobum Wells pupugit & percussit*, wherein there is a *præfat' Jacobum Wells* too much, and so is Nonsense. Then there is another Thing which is very odd, tho' it may not be Error, because it may possibly be a sufficient Description; the Indictment says, he gave him a mortal Wound *latitudinis unius pollicis*, and *profunditatis in & per corpus*; let it be quash'd. And he was bail'd to appear at the next General Gaol-delivery for the County of *Wilts*.

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Term. Paschæ,

Anno 9 W. III. 1697.

King versus Greenvelt.

MOTION to discharge Dr. *Greenvelt*, committed by the Censor of the College of Physicians, *pro mala praxi* in the Year 1692. chiefly because this Offence is pardoned by two general Acts of Parliament since. The Counsel for the College insisted, that tho' General Pardons pardon'd all publick Offences, yet it did not release any private Right: That this Penalty *pro mala praxi* was not only a publick Infliction, but also a Satisfaction in Part to the Party. But suppose it were only a publick Punishment, the King having granted the Fines to the College, he could not by the Pardon destroy his own Grant; and therefore that these Fines remain notwithstanding. But *per Cur' seriatim*, The Penalty *pro mala praxi* is only a Satisfaction to the Publick Justice, and not to the Party who had his Action on the Case; and that whenever a Crime is pardoned, all the Effects and Consequences thereof are discharged: That when an Act of Parliament appoints a Fine for a publick Offence, such Fines of common Right belong to the King, unless they be otherwise particularly disposed: That the King, by granting away his Fines, does not extinguish his Power of Pardoning; for that would be an Extinguishment of his Prerogative by Implication; and Power of pardoning being inseparably annexed to the Crown, and not grantable over, the King therefore pardoning this Offence before the Fine actually imposed, whereby an Interest would have vested in the Grantee, the Offence was thereby gone, and thereby the Penalty depending thereon discharged. The Prisoner was discharged.

Pardon.
Wherea Crime
is pardon'd,
all the Effects
and Conse-
quences there-
of are also
discharged.

5 Co. 47. a.
6 Co. 13. b.
Dy. 249.

Reynolds

Reynolds versus Gray.

Salk. 70. S.C.
Postea Pasch.
13 W. 3. Mi-
chel v. Harris.
Award by
Umpire, be-
fore the Time
of the Arbi-
trators is ex-
pired, is void.

MOTION for an Attachment against the Defendant, for refusing to perform an Award by an Umpire, on a Submission by Rule of Court, which after some Dispute was referr'd; wherein it was held and agreed *per Cur'*, that if the Submission be to refer the Matter in Controversy to Arbitrators, and if they do not make an Award by such a Day, that they shall make an Umpire; that there the Arbitrators cannot chuse an Umpire till the Day be past for the making their Award; and when they have chosen one generally, they cannot after chuse another, because they have executed their Authority: But if they chuse him conditionally, that he will accept it, and he refuses, they may chuse another, because they never executed their Authority.

Hallett versus Birt.

5 Mod. 252.
Pleadings.
Salk. 580.
Carth. 380.
Skin. 675.
Hundred
Court can on-
ly grant Re-
plevins in
Court; tho'
doubtful whe-
ther can do
it there.

TRespass for taking his Cattle at *Bemister* in *Gloucestershire*. Defendant pleads Not guilty as to all but three Cows; and as to them he pleads, that the Hundred of *Bemister* is an antient Hundred, and that long before the Trespass committed, the Bishop of *S.* was seisd in Fee, in Right of his Bishoprick, of the said Hundred; and that he and all his Predecessors, and those whose Estate he hath, had Time out of Mind a Court therein, for all personal Actions under 40s. and of Replevins in the Hundred, to be held before the Suitors thereof, from three Weeks to three Weeks; and that Time out of Mind the Bishop and all those, &c. or their Stewards, on Plaint made to them, or their Stewards, in the said Court, or *out of Court* within the Hundred, of any unjust Taking and Detention within the said Hundred, have used to make Deliverance thereof. That the Bishop of *S.* conveyed the said Hundred to *C.W.* Esq; who made *H.S.* his Steward; and that after this the Plaintiff *cepit & imparcavit* three Cows of one *A.* who thereupon complain'd to *H.S.* and finding Pledges *de prosequend' & returno habend'*, *H.S.* by a certain Warrant under his Seal, directed to the Bailiff of the Hundred of *Bemister*, and the Defendant, commanded them to take and replevy the said Cows; by Virtue whereof he took and carried them away; which is the same Trespass; *absque hoc*, that he is guilty,

guilty *aliter aut alio modo*. Plaintiff demurr'd, shewing for Cause that it amounted to the General Issue. And *per Cur'*, it does amount to it. As to special Pleading; we take this Rule; that wherever the Defendant sheweth a Cause of Action in the Plaintiff, either express or implied, and confesseth and avoideth it, it is a good Plea; for by Confession and Avoidance, he confesseth the Plaintiff hath Cause of Action against him, were it not for some special Matter in Law, by which is not meant a Question in Law; but a Thing which in Law avoids the Cause of Action, as Sale in Market overt, and without leaving a Cause of Action, it will amount to the General Issue; and this is the Reason of Colour. Now here the Defendant hath shewed that the Cattle were not the Plaintiff's, but that he took the Cattle of a Stranger, and *imparcavit*, whereby they were in *custodia legis*; whereas if he had said *cepit & detinuit*, it might have been probably well enough. Then suppose the Hundred-Court might hold Plea of Replevin, which is hard to imagine, yet it must be as a Court. The Sheriff, before the Statute of *Marlbridge*, could not grant a Replevin out of Court, much less a Hundred-Court, or Court-Baron; and that enables only the Sheriff to replevy out of Court; and how can a Thing be grafted on a Prescription, which had its Original by Act of Parliament. *Jud' pro Quer'*.

Ante p. 97.
101.
Postea Mich.
10 W. 3.
Harrison v.
Cage & ux'.
Pasch. 12
W. 3. Par-
mour v. John-
son.

Duke of Norfolk versus Alderton.

Scandalum Magnatum laid in *Middlesex*, and Motion made for changing the *Venue* on a common *Affidavit*. But Court refused it, and said they would not, unless upon special Reasons.

Postea Pasch.
12 W. 3.
Steer v. Shall-
croft.

Bennet versus Talboys.

TRespass for Breaking and entring his Close, and tread- ing down his Grass, &c. *necnon in eodem clauso venatus fuit, Anglice* did hunt, *eodem defendente existente artificie inferiore, Angl'* an inferior Tradesman, *viz. pannario, contra pacem & contra formam Stat'*. Verdict on Not guilty *pro Quer'*; and moved in Arrest of Judgment, that the Conclusion of *contra formam Stat'* goes to the whole Count, and Part of the Trespas contain'd is not forbidden by any Statute, wherefore the whole Count is void; and

Salk. 212.
5 Mod. 307.
Carth. 382.
Comb. 420.
Declaration
contra formam Statuti, where
some Things
are within the
Statute, and o-
thers not, is
good, for as to
those which
are not, 'tis
it Surplusage.

it was answered, that there were three several Trespasses laid in the Count, which are distinct from each other, and so many several Counts; so that *contra formam Stat'* goes only to the later, to which it is annexed. And *Holt* said, if an Act of Parliament increases a Penalty, or deprives a Man of any Benefit which he had before at Common Law, then if you count on the Statute, and do not bring your self within it, and conclude *contra formam Stat'*, it is naught. And if there be no Act of Parliament at all, and you conclude *contra formam Stat'*, it is only Surplusage; so is *Ward* and *Richill's Case*, 1 *Vent.* 103. But now the Question is here, what shall be done on an Act that gives an Increase of Costs, wherein it only restores the Common Law, which was taken away by 22 & 23 *Car.* 2. In this Count are several Trespasses alledged, the later whereof is only within the Statute, and the Conclusion of the Count is *contra formam*, &c. which tho' in Grammatical Construction it goes to the whole Count, yet in Law goes only to the Hunting not duly qualified; and why may we not apply it only to the later Part, and reject it as to the rest as Surplusage; as was done on an Indictment in the Case of *Page* and *Harwood*, *Allen* 43, 44. *Jud' pro Quer'*. And that seeing the Hunting and Breaking the Close cannot be separated, the Plaintiff shall have Costs according to the new Statute.]

Parker and Meller.

Vide 1 *Vent.* 249.

2 *Lev.* 92.

3 *Keb.* 219, 232.

1 *Vent.* 127. In Replevin, Property in a Stranger a good Plea in Bar.

Vide *Mich.*

2 *Ann.* *Pregrave and Saunders in*

B. R. acc'.

2 *Cr.* 519.

Cro. El. 896.

REplevin; Defendant pleaded in Bar Property, at the Time of the Taking, in a Stranger, and not in the Plaintiff himself, and so prayed a Return; Plaintiff demurr'd. *Per Cur'*: Property without Doubt may be pleaded in Bar of the Action in Replevin; and if it be in the Defendant, he may pray a Return; but if it be in a Stranger, unless he hath the Custody by Bailment, and so makes a special Avowry, it is a Question, whether he can have a Return. But afterwards this Term, adjudg'd the Plea was good, tho' he had made no Avowry at all, because he had the first Possession; and it was not reasonable the Plaintiff should retain, having no Property; and so adjudged that he should have a Return.

King versus Page, Ingram & al.

INDICTMENT for a Riot, a Calendar Month and a Day after Riot committed, before Justices of Peace *per Sacramentum*, *duodecim, &c. pro Domino Rege presentatum existit.* This Indictment was on the Statute of 13 H. 4. c. 7. and resolved, that where the Inquisition was on View, there the Sheriff must be present; but not where the Inquisition or Indictment is after the Fact committed. 2dly, The Statute is only Mandatory to the Justices, under a Penalty, to make Inquisition within a Month, but does not prohibit the Doing it after the Month, which they may, if they will, lawfully do. 3dly, This being a special Inquisition, it is always *pro Domino Rege*; but if it be at the Assizes, or before Justices of Oyer and Terminer, then it is *pro corpore Comitatus*.

Carth. 383.
Comb. 423.
Riot, where
Inquisition is
on View, the
Sheriff must
be present;
and the Justices may make
Inquisition after a Month.

Head versus Tyler.

HOLT: If there be a Copyhold Estate for Life, Remainder to B. if Tenant for Life forfeit, it is not such a Determination as to let in the Remainder; but the Lord shall enjoy it during the Life of Tenant for Life.

1 Saund. 151.
9 Co. 107. a.
Forfeiture of
Tenant for
Life of a Copyhold, for
the Benefit of the Lord.

Cholmely versus Bloom.

DEBT against the Defendant *in Custodia Marefch*, on a Bond made at *Chester*; the Defendant pleaded he was, at the Time of exhibiting the Bill, an Inhabitant and notoriously conversant in the County Palatine of *C. viz. at Nantwich*; which Plea the Plaintiff apprehending to be a foreign Plea, he signed his Judgment, because it was not sworn to; and *Cheshire* moved to set the Judgment aside, because it was not a foreign Plea; for Pleas to the Jurisdiction of the Court are not such; as Pleas of Ancient Demesne, Privilege, &c. and therefore are never sworn to. But a foreign Plea is where the Defendant carries the Action out of the County where the Plaintiff had laid it; if the Action be transitory, there, if Defendant carries it into another County, the Plea is naught, except in special Cases; but if the Action be local, the removing it into another County, than where the Plaintiff had laid it, it is properly a foreign Plea;

5 Mod. 335.
Carth. 402.
Foreign Plea
must be sworn
to, but a Plea
to the Jurisdiction need
not.

Plea; which is not done in this Case; for here the Action is laid in *Cheshire*, and the Defendant doth not in his Plea remove it from thence. *Quod Cur' concessit*; and Judgment set aside.

Sheppherd versus Taylor.

Distringas is the Execution on a Judgment in a Court-Baron, and not a *Levari*, without particular Custom.

ERROR in Replevin for taking six Pewter Dishes; Defendant makes Conusance, that a Judgment was had in a Court-Baron against the Plaintiff; and that a *Levari facias* issued out against him; upon which he took the Pewter Dishes; Plaintiff demurr'd, and had Judgment; and it was now affirmed: Because a *Distringas* is the Execution on a Judgment in a Court-Baron; and not a *Levari facias*, without a particular Custom alledged, which is not done: And the Avowant should not have begun with the Judgment first, but have shewn a Plaint enter'd, and *superinde taliter processum fuit*; and so Judgment against him.

Earl versus Plummer.

DEBT by a Sheriff, for his Fees for Executing an *Ex-tendi facias* returnable *quinque Pasch'*; wherein he declared on a Statute made 29th of *October* 28 *Eliz.* Defendant demurr'd to the Declaration; 1st, Because there is no such Return as *quinque Pasch'*. *Sed non allocatur*, because at most it is but an erroneous Writ; and if the Party himself will take out such an erroneous Writ, he shall not under Pretence thereof cheat the Sheriff of his Fees. 2^{dly}, Because the Session of Parliament did not commence on the 29th of *October*, but on the 15th of *Feb'* following. *Sed tota Cur' contra*; For as it was now made appear from a Copy taken from the Parliament Rolls, and from 1 *Anderson* 294, 295. The *Teste* of the Writs of Summons of that Parliament were the 15 *Sept.* 28 *El.* appointing them to meet the 15th of *October* following; and on the 8th of *October* the Parliament was prorogued to 27 *Octob'*, and after to the 29th of *October*; and then the Parliament was adjourn'd, but not prorogued till *February* following. *Jud' pro Quer'.*

Fisher versus Pomfret.

PER Cur': A Bill of Exchange payable to a Man and his Order, or to his Order only, was one and the same.

Ord versus Howard.

IF you plead Alienee in Bar, you must lay a Place where he is born; but if in Abatement, it is triable where the Action is brought.

Alienee plead-
ed in Bar or
Abatement.
1 Saund. 8.

Postea Trin. 10 W. 3. Williams v. Drury

Sir Roger Puleston versus Sir Peter Warburton.

Ejectment on a Demise made 10th of April 1697. *Habendum* from the 25th of M. then last past for five Years, by Virtue whereof he enter'd and was possessed, till the Defendant April the 7th entered and ejected him; which Declaration was of Trin. Term last; Issue Not guilty; Verdict for the Plaintiff, on a Trial in Mich. Term last; and moved in Arrest of Judgment, that it appears in the Declaration, that the Plaintiff had no Cause of Action at the Time of the Action brought; and it was now moved, that being a plain Mistake of the Clerk, it was amendable; but especially in Ejectment, which is a Creature of the Court's, set up to try a Title; wherein, according to every Day's Experience, the Defendant is changed, and sometimes the Plaintiff, and sometimes the Term of the Demise is enlarged; and the Court gave Judgment, they would have it amended, if they could, but they were Judges of Law and not of Equity; and if such Amendments should be suffered, great Incertainties would be introduced; that if this be amended, the Nature of Declarations would be alter'd, and another Term would be counted on; and Judgment was now said: After which the Counsel of Plaintiff moved, that tho' they could not have Judgment for the Recovery of their Term, yet they might for their Costs and Damages, here being an Entry and Ouster found, which is sufficient to intitle them to that; as if the Term expires pending the Suit, the Plaintiff shall recover his Costs and Damages, tho' not his Term. *Sed per Cur' contra*; That in Case of Expiration of a Term,

Salk. 48.
5 Mod. 332.
Carth. 401.
Ejectment
brought on a
Demise bear-
ing Date sub-
sequent to the
Ejectment, not
amendable

pending the Writ, the Court shall go on to Judgment, as to the Costs and Damages; because it was not the Plaintiff's Fault that the Term expired pending the Writ, and his Writ is not falsified thereby; but that otherwise it is in this Case, because here is no Term at all; and the Reason of Damages in Ejectment is the Turning the Termor out of Possession; and here it appears he had no Possession at all: After it was agreed by Consent they should amend, and that the Judgment be for a Security; and Defendant take a new Declaration; and Defendant to deliver Possession, if Verdict be against him, and not bring Writ of Error.

D E

Term. Sanct. Trin.

Anno 9 W. III. 1697.

Lydston verlus Mayor and Bailiffs of Exeter.

Return to a
Mandamus
need not be
under the
Hand of the
Mayor or Seal
of the Corpo-
ration.

Postea Mich.
11 W. 3. The
King v. Bour-
rough of A-
bingdon.

THEY returned a *Mandamus*, and there was nei-
ther the Hand of the Mayor, or Seal of the Cor-
poration to it; and *per Cur'*, it is well enough with-
out it; before the Statute of *York*, the Sheriff need
not have set his Hand to any Return. If the Return be false,
you may bring your Action against the whole Body Poli-
tick for making a false Return; and against a particular
Person for procuring a false Return.

I

Hodgeson

Hodgeson versus Segrave.

WRIT of Error on a Judgment in the County Palatine of *Chester*; Plaintiff in Error delay'd to bring in the Record; whereupon the Defendant moved for a Rule to bring it in, and for the Plaintiff to assign his Errors, or otherwise that they might return a *Nonpross*; to which the Court said, that their direct Way was to take a Certificate from the King's Bench Office, that the Record is not come in, and on shewing thereof in Chancery, they will have a Writ *De executione judicii* of Course.

Chancery will grant a Writ of Execution, on producing a Certificate from the King's Bench Office, that the Plaintiff in Error out of the County Palatine of *Chester* does not bring in the Record.

ter does not bring in the Record.

West and Cole.

INDEB' *Assumpsit*, and *Quantum meruit* for Meat, Drink and Lodging; and another *Assumpsit* and *Quantum meruit*, in the same Declaration, for Wares sold; Judgment by Default; Writ of Enquiry, and intire Damages given *occasione præmissorum*: And Judgment moved to be staid; because in the second *Assumpsit* and *Quantum meruit* there is no Averment *in facto* of the Value of the Wares, and so is void, and for which no Damages can be given. A *Quantum meruit* for Wares sold, without Averment *de facto* of the Value, is naught; but here being another *Assumpsit* well laid, we will suppose all the Damages given for that, and reject the other as Surplusage.

Postea Mich. 9 W. 3. West v. Cole. Where on Writ of Enquiry intire Damages are given, and for Part of which no Damages could be given, that Part shall be rejected as Surplusage. Vid. post. 131.

Crawley versus Blewett and Wolf Vicecom' Midd'.

ACTION *sur* Case for a false Return of *Nulla bona sur Fi' fa'*, when there were Goods sufficient; and the Plaintiff declared on a Judgment *in Communi Banco*, and on Evidence produced a Copy of a Record Mich. 8 W. wherein was writ in the Margin *Cook*, (who is one of the Prothonotaries of the Common Pleas,) but there was no *Placit' coram*, &c. at the Top; for which Omission the Defendant insisted that there was no fair Copy of a Record; that it did not appear who this *Cook* was. That the Plaintiff declared of a Plea held before Sir G. Treby, and it did not appear that the Record produced by him was such a one; and of that Opinion was *Holt*, who tried the Cause; which

Postea Pasch. 12 W. 3. Freeman v. Bluet, acc'. Nonsuit not to be set aside, without Consent.

which the Plaintiff perceiving was Nonfuit; and now the Plaintiff moved, tho' in Strictness he should begin again, yet it being a hard Case, that the Nonfuit might be set aside, and they might try it *de novo*; & *per Holt*, formerly, and especially in *Twisden's* Time, if you had declared that such a one was impleaded in the *K. B. per billam*, if you had produced the Plea-Roll, wherein it is entered, that *Memorand'* such a one came & *obtulit billam*, this was not adjudg'd sufficient, unless you had also produced a Copy of the Bill on the File, for Want of which there were frequent Nonfuits; tho' I could never be of that Mind; and have on Debate ruled a Copy of the Plea-Roll to be a sufficient Proof of the Bill. But in this Case the Defendant would not Consent; wherefore Court said, they could not do it; when he had, by his voluntary Act, put himself out of Court, they could not, by their own Authority, bring him in again.

King versus Melling.

5 Mod. 348.
New Trial not
grantable, after
Trial at Bar,
for going a-
gainst Evi-
dence; *aliter*,
on Misbehavi-
our of the Jury.

A New Trial was never granted, after a Trial at Bar, purely for going against Evidence; except once in King *James's* Time; but they are often granted for special Reason, as Misbehaviour of Jury, or some other Misdemeanor. *Ante* 93.

Grascot and Warren.

Ejectment and special Verdict; the Cause was this: A Man possess'd of a Term devised it to Infant *in Ventre sa mere*, if it should be a Son; and if it should be a Son, and die during his Minority, then he devised it to his Grandson; after which he died, leaving his Wife Executrix, and the Child was after born, and proved a Daughter; and it was adjudged, without Argument, that the Executrix, and not the Grandson, should have the Term; because the Grandson was not to have it, but upon a precedent Contingency, *viz.* the Birth of a Son, and his Death in his Infancy, which Condition must be first performed; and it appears plainly, that the Intent of the Testator was that he should not have it otherwise.

Bacon versus Debarry.

DEBT on a Bond conditioned, that the Defendant, on Behalf of *De Ruiter*, should stand to the Award of *C. and M.* of all Matters between the Defendant, as Attorney to *De Ruiter*, on the one Part, and the Plaintiff on the other; concerning certain Accounts between the Plaintiff and *De Ruiter*. Defendant pleads no Award made; Plaintiff replies and sets forth an Award; which he sets forth to be made *de Præmissis*, which was, that the Defendant, on Behalf of *De Ruiter*, should pay to the Plaintiff 45 *l.* 6 *d.* 10 *d.* and that after that the Plaintiff and Defendant, on the Behalf of *De Ruiter*, should execute mutual Releases to each other, *ad usum eorum alterius*, of all Actions, Matters, &c. concerning those Accounts; and assigns a Breach in Non-payment of the Money. Defendant demurs; and it was resolved, 1st, The Submission of the Debt is good; for the Defendant puts himself in the Place of *De Ruiter*, and is bound to perform the Award. 2^{dly}, That this Award is a void Award, because not mutual, but of one Part only; for first, the mutual Releases are to be made between the Plaintiff and Defendant, where they ought to have been between the Plaintiff and *De Ruiter*, or to be delivered to *Debarry*, for the Use of *De Ruiter*; for a Release to *Debarry* can by no Means advantage *De Ruiter*; we would, if we could, have construed it to be a Release to *Debarry* for *De Ruiter*, but the Words *ad usum alterius eorum* exclude this Construction. The last Time this Case was argued, Sir *Barth. Shower* insisted, that this Award was good, if there had been no Releases at all awarded, as to which there hath been some Doubt if such Award be made *de præmissis*; which this is not. It is pleaded indeed, and averr'd to be *de præmissis*, but when the Award is set out, that says no such Thing. But supposing it to have been made *de præmissis*, yet when he comes and does not rest on that, there is a void Thing awarded on the Behalf of *De Ruiter*. It is plain, that the Arbitrators did not rely on the Payment of the Money to be Satisfaction, but on the Releases too, which spoils the whole Award; and this is grounded on *Capel and Holland's Case*, *Style* 44. *Allen* 10. 1 *Rol. Abr.* 254. and on *Hall and Massye's Case*, 1 *Rol. Ab.* 254. If in this Case it had been said, the Money should have been paid in Satisfaction of all Accounts; or

Salk. 70. S.C.
Skin. 679.
Carth. 413.
Comb. 439.
Submission to
Award by At-
torney shall
bind the At-
torney.

2 Lev. 31

that they had examined all Accounts, and on stating thereof there had appeared so much due to *Bacon*, and that they had awarded the Money to have been paid for all Accounts; the subsequent Matter would not have vitiated it; as in the Case of *Burbidge* and *Raymond*, 1 *Roll. Abridg.* 255. Therefore *Jud' pro Def'*.

Freeman versus Bernard.

1 Salk. 69. S. C.
Carth. 378.
Comb. 440.
Award of mutual Releases,
and nothing else, not good.
Postea Mich.
12 W. 3. Anonymus, acc.
Vide 2 Jo. 6, 15.

A *Sumpsit* on the Sale of Hops. Defendant pleaded Submission to Arbitrators, who awarded, that each Party should release all Actions to each other; that he tender'd such a Release, and was and still is ready to release, and so prays Judgment *si actio*. Plaintiff demurr'd; Question was, whether the Defendant's Plea was a good Bar: And *Holt* delivered the Opinion of the Court; and said, there is no Question, but if they had awarded a Sum of Money to be paid, or a Horse, or any Thing in Satisfaction, the very awarding of this, tho' not actually delivered, would have been a good Bar. But now in this Case there is nothing awarded, but only a Way and Means mutually to discharge all Actions: Now there is a great Difference between awarding the Doing any Thing in Satisfaction, and the Awarding a Release of an Action; for when a Thing is awarded to be done in Satisfaction, that raises a new Duty in lieu of the old one discharged; as if Money be awarded to be paid, Debt lies for it: But in the Case of a Release, there is only a Method ordered to discharge the Action: If the Award itself discharge the Action, there needs no Release to be given, because Action was gone before; but the Action being not discharged till the Release comes, till it comes actually it cannot be a Bar. *Jud' pro Quer'*.

Bennoyer versus Brace.

5 Mod. 338.
Salk. 319.
Comb. 441.
Death of one of the Plaintiff's in Error must be suggested on the Roll, before Execution can be taken out.

HOLT: This Case stands for the Resolution of the Court, on a Motion: Trespass against four; Verdict, and Judgment for the Plaintiff against four; all four bring a Writ of Error after Judgment given; one of them dies before the Record certified, and Plaintiff takes out a *Capias ad satisfaciend'* against the Survivors: Whereon two Questions have been; 1st, Whether, if Judgment be had against two Defendants,

Defendants, and one dies, Execution may be had against the Survivor without *Scire fac'*; which we hold it may, supposing it to be within the Year; because there is no Change of the Record at all; and it shall not be intended there was a Release to the Party deceased. *2dly*, Whether in this Case, when the Writ of Error abated by the Death of one of the Plaintiffs in Error, Execution might be taken out against the rest, without apprising the Court thereof; by the Writ of Error the Hands of the Court were tied up, so that they ought not to award Execution till they are satisfied their Hands are loose. Now here is an Execution, without making this Matter appear to the Court, for which Reason it went out erroneously; and therefore let *Superseas* go *quia emanavit improvidè*, &c.

Prince versus Molton.

ACTION on the Case, wherein Plaintiff declared, that the 2d of *July 6 Will* he was possess'd of a Meadow next adjoining to a River, and to another Close contiguous to the said River; which River, Time out of Mind, run through his Meadow to an antient Mill of the Defendant's, without any Overflowing. That the Defendant the 3d of *August 6 W.* extended and enlarged the Foundation of his Mill further into the River, whereby he so obstructed the River, and exalted the Water, that it overflow'd and drown'd the Plaintiff's Meadow, *per quod* he lost the Use and Profit thereof, from the aforesaid 2d Day of *July* to the Time of exhibiting the Bill. Not guilty pleaded, and Verdict for Plaintiff. It was moved in Arrest of Judgment, that intire Damages are given to the Plaintiff, and from the 2d of *July* to the 3d of *August* he had no Damages at all, by his own shewing; and it shall not be intended, that the Damages given by the Jury are only for the Time after the 3d of *August*; for the Damages shall be understood to be given not according to Law, but according to the Allegation of the Plaintiff, who layeth his Damage; as resolved in *Harbin and Green's Case*, *Hob.* 189. *Moor* 887. And first, all the Court, except *Rookby*, seemed to think it well enough; for it may be the Plaintiff laid up his Meadow for Grass from the 2d of *July*; but after Judgment was arrested; for tho' he might lose the Profit from that Time, he notwithstanding could not lose the Use; if he had not said (*Usum*) they

Carth. 386.
Salk. 663.
Comb. 442.
Where Damages are given for what is impossible, 'tis ill.
Ante p. 127.

they might have given Judgment for him; this Case is the very same with *Harbin* and *Green*. Judgment arrested.

King and Ferison, and Inhabitants of Chesterfield.

5 Mod. 328.

Carth. 400.

Salk. 478.

Comb. 443.

Boy put out to learn to Shave, there being no Covenants with him, gains no Settlement.

A Boy was put out to a Barber for a Year to learn to Shave, and to make Bob-Periwigs; according to Covenants between the Barber and Sir *Paul Fenkinson*, the Boy's Master, to which Covenant the Boy was no Party; and adjudged this made no Settlement, because it is no Service; he being no more than a Boarder there for his Education, which shall not make a Settlement.

Chickham versus Dickson.

Prohibition may be after Sentence, if it appears on the Proceedings that they have not Jurisdiction.

1 Rol. Ab. 80.

Per *Holt* in

B. R. Mich.

4 Ann.

Postea Mich.

9 W. 3. *Terremoulin and Sandys*. Postea p. 134. and Mich. 10 W. 3. *Pool v. Gardner*.

PER Cur: If one be sued in the Spiritual Court, for an Ecclesiastical Matter, out of his Diocese, it is too late to come after Sentence for a Prohibition; because the Party has affirmed the Jurisdiction: So if he be sued for a Matter not belonging to Ecclesiastical Conusance; but if it doth appear on the Proceeding, that they have meddled with a Matter which belongs not to them, a Prohibition shall go after Sentence; but *secus*, where that does not appear on the Face of their Proceedings.

Rule.

Holt made this Rule be observed for the future; that if a Man surrender himself on a Judgment given against him, and he be not charged within two Terms after the Judgment, he shall be discharged on common Bail; but at the same Time he must bring a Certificate from the Clerk of the Errors, that there is no Writ of Error pending; because otherwise he might, by Writ of Error, close up the Hands of the Plaintiff, and so take Advantage of his own Wrong.

Outlawry how pleaded in Bar and in Abatement.

Holt: When you plead Outlawry in Abatement, when you put your Plea in the Office, you must shew a *Capias*, or some such Matter, as may make the Outlawry appear, and not conclude only *prout patet per Recordum*, as you do when you plead it in Bar, and have Time to bring in the Record.

D E

Term. Sanct. Trin.

Anno 9 W. III. in Cam' Scacc'.

Leaves versus Bernard.

CASE on several Promises; *Def' venit & defendit vim & injuriam quando, &c. & petit Judicium de narratione & quod Narr' præd' casset.* Plaintiff joined in Demurrer, and had final Judgment. Defendant brought Writ of Error alledging, that final Judgment ought not to have been, but only a *Respondeas ouster* awarded, this Plea being only in Abatement, and not in Bar. *Sed per Cur' totam;* By the Course of the *K. B.* where-foever you commence by Bill, a Praying Judgment of the Count is a Plea in Bar; and in that Case, if you plead in Abatement of the Count, you must not pray Judgment of the Count, and that the Count may be quashed; but you must pray Judgment of the Bill, and that the Bill may be quashed. Judgment affirmed.

Where a Suit
is commenced
by Bill, Pray-
ing Judgment
of the Count
is a Plea in
Bar.

Roe versus Haugh.

B. Was indebted to *A.* 42*l.* and *C.* in Consideration *quod A. accipere vellet ipsum C. fore debitorem ipsius A. pro quadraginta duob' lib' eidem A. per B. tunc debit' in vice & loco ejusdem B. super se Assumpsit & eidem A. promisit quod ipse C. easdem quadraginta duas lib' eidem A. solvere vellet.* *A.* dies; his Executors, on this Promise, bring an *Assumpsit* against *C.* averring in their Count, that *A.* the Testator trusting to the said Promise of *C.* *accepit præd' C. fore debitorem ipsius A.* without saying any Thing that

M m

he

he discharged *B.* *Non assumpsit* pleaded; Verdict and Judgment for the Plaintiff. Writ of Error brought in the Exchequer Chamber; where the Error insisted on was, that this is a void *Assumpsit*, here being no good Consideration; for except *B.* was discharged, *C.* could not be chargeable; for which Reason *Blinckow, Powel* and *Ward* were of Opinion, Judgment should be reversed; but *Powis, Newill, Lechmere* and *Treby*; That this being after Verdict, they should do what they could to help it; to which End they would not consider it only as a Promise on the Part of *C.* for as such it would not bind him, except *B.* was discharged; but they would construe it to be a mutual Promise, viz. that *C.* promised to *A.* to pay the Debt of *B.* and *A.* on the other Side promised to discharge *B.* so that tho' *B.* be not actually discharged, yet if *A.* sues him, he subjects himself to an Action for the Breach of his Promise. *Jud' affirm'.*

Vid. 1 Saund.
210, 211. Sur
Demur'.

King versus Broom in B. R.

5 Mod. 340.
Carth. 398.
Comb. 444.
By Admiral
Law, Pro-
perty of a Ship
taken from an
Enemy, with-
out Letters of
Mart, vests in
in the King.

Postea Mich.
9 W. 3. Ter-
remoulin and
Sandys.

BROOM, by Authority under the *African* Company, (who, by the King's Letters Patent, had Order to take the Ships of Enemies, and dispose them as they pleased;) took a *French* Ship on the High Sea, and carried it into a River beyond Sea, and sold it there: This Ship, upon a general Monition *contra omnes gentes* fix'd upon the Exchange, was condemned in the Admiralty for Prize; and the Grantee of the Perquisites of the Admiralty libell'd, in the Name of the King's Advocate, against *Brown*, reciting the Taking and the Condemnation; and that it was a Perquisite of the Admiralty, and alledged, that *Broom* had not delivered the Ship on Request, but had converted it, &c. And Sentence was given against *Broom* in the Admiralty, from which he appeal'd to the Delegates; and now pray'd a Prohibition, suggesting, that the Matter arose *infra corpus Com'*, and this is a plain Action of Trover: But against the Prohibition it was objected, 1st, That it is after Sentence, and to stop his own Appeal; and for this cited 1 Cr. 69. *Latch* 253. *Winch* 8. 2 Bro. 34. 12 Co. 77. 2 Rol. Abr. 319. But *per Cur'*, if a Prohibition be not grantable after Sentence, they sitting all the Vacation may hasten the Sentence, and conclude the Parties before the Term; and it is proper for the Party to appeal to suspend the Sentence, till he may be relieved by Prohibition; and where in the Libel, or Proceedings, it appears that the Cause of Suit arose on the Land, they may be

prohibited at any Time. 2^{dly}, That this River did not appear to be Part of the Continent, or of the main Sea; and the Suggestion, that this is *infra corpus Com'* is not proper; because beyond Sea there are no such Divisions by Counties. But this was not regarded by the Court; that where the original Cause arises on the High Sea, the Admiralty shall hold Plea of the entire Suit, tho' other Matter subsequent arises on the Land. 3 Cr. 685. 2 Saund. 259. 1 Sid. 320. And it was resolved by the whole Court, that tho', if Goods be taken from an Enemy, it vests the Property in the Party taking them, by our Law; yet by the Admiralty Law, the Property of a Ship taken, without Letters of Mart, vests in the King upon the Taking, and this on the High Sea; therefore that which was taken was but in Trust for the King, and he who took it is but accountable to him; and for the Account, and Breach of this Trust, the Suit is in the Admiralty very proper. Now if the Party, who took this Ship, brought it to Land, and there sold it, and converted it to his own Use, this makes him a Wrong-Doer *ab initio*. Carpenter's Case, 8 Co. 146. And the Conversion on the Land is but one continued Act, with the Capture, and is Evidence to explain his Intent in the Capture, to shew his Breach of Trust on the Sea; and as Cases very strong in this Case were cited, 1 Sid. 320, 367. 2 Saund. 259. Palm. 96. 2 Rol. Rep. 157. and Rule for Prohibition discharged.

Ante p. 132.

Postea Mich.

10 W. 3. Pool

v. Gardner.

D E

Term. Sanct. Mich.

Anno 9 W. III. in B. R. 1697.

P. C. 1. L. Raym. 262. King verſus Sir Rich. Raines, Judge of the Pre-rogative Court.

1. Salk. 299. Case of same
Carth. 457. Name but quite different as to subject & of points.

Per Holt:
 Probate ſufficient Proof of a Will.

ONE John Gray died in April laſt, making two Executors, who, the 20th of April laſt, brought the Will into Court to be proved; where, the Will being litigated, Proceſs iſſued to all Parties concern'd, and among others to Francis Gray, Brother to the Deceas'd, who refus'd to appear, and ſo was adjudg'd in Contempt; but the others appear'd, and the Cauſe was ſet down for Sentence 25 October, which is Monday next. But the laſt Day of laſt Term, on a Motion of Courſe by the Procurement of Francis Gray, a Mandamus, on Suggeſtion that J. Gray died Inteſtate, was granted to the Judge of the Prerogative Court, commanding him to grant Admi-niſtration; which Writ was returnable this Day 23 October: And now Northey pray'd the Writ might be ſuperſeded; becauſe it was a Surprise to the Court, who would not have granted it, if they had been apprized of the Matter; for by this Means the Spiritual Court would be ouſted of its Jurisdiction; for if the Judge return it was litiga-ted before him, that Return perhaps might be inſufficient, and ſo a peremptory Mandamus granted; or if he return, that there was a Will made, they would try in an Action the Validity of the Will: And the whole Court gave Judgment, that the Writ ſhould be ſuperſeded; and eſpecially as this Caſe is, where Party might have litigated it in the Spi-ritual Court, where he would not appear, but is in Contempt. And Holt added, that ſuppoſing they ſhould not ſuperſede the

the Writ, yet it would not be any Advantage to them; for supposing Sir *Richard Raines* should return, that there was a Will made, he might go on and prove the Will, and in their Action on a false Return, give the Probate in Evidence; which Probate, as long as it stands in Force, shall conclude all others from saying the contrary; to which End he quoted an *Anonymus* Case, adjudged in *Keeling's* Time: An Executor brought an Action, producing his Testamentary Letters; Defendant pleaded he was not Executor, which according to *Hensloe's* Case is triable *per Pais*; in the Trial whereof, at *Guild-hall* before *Keeling*, the Plaintiff gave no other Evidence than the Probate under Seal, which *Keeling* allowed to be sufficient; and after, on Motion here, all the Judges concurred with him; because they having Jurisdiction of the Cause, it was an undeniable Evidence, which should conclude all others from saying the contrary.

Sir Samuel Grimston versus *Moreley*.

MOTION to stay the Entry of a Judgment, on a Verdict against the Defendant; the Case was: The Defendant owed the Plaintiff Rent, and being indebted to several others, he took Advantage of the late Act of Parliament for the Relief of Debtors; and before the Trial, got two Thirds in Number and Value to agree to his Composition; notwithstanding Verdict was against him; and now pray'd to stay the Entry of the Judgment, because *eo instante* that the two Thirds signed, the Plaintiff was bound; and should the Judgment be enter'd, the Defendant would lose the Benefit of the Act, because Judgments are excepted therein. *Sed per Cur'*, The Design of the Act was only to discharge the Body, that it should not be liable to be taken, and was not intended to take away any other Security, whereby a Man might come by his Debt without meddling with his Body; now in this Case there was an Action commenced, the Defendant was out on Bail, and if the Plaintiff can come at the End of his Suit, without meddling with his Body, we cannot hinder him, at least on Motion. But if you think you have the Law on your Side, you may have your *Audita querela*; or if he takes the Body in Execution, you may come before a Judge, who will discharge him. But let Plaintiff, if he will, enter his Judgment on the Verdict.

The Act of Parliament for Relief of Debtors only extends to their Persons; if can recover without touching their Persons, may.

Trantor, al' Trantrel, versus Duggan.

Whether Sequestration will lie for not answering a Bill in Equity in the Grand Sessions, in Respect of a Person not resident within the Jurisdiction.

MOTION for a Prohibition to the Grand Sessions of *Radnor*, because on an *English* Bill in Equity there they had granted a Sequestration; whereas by the Law of the Land, no Man ought to be subpenaed to answer an *English* Bill in those Courts, unless he lives and be personally served there, that is within the Jurisdiction thereof; and the Court were of Opinion to grant a Prohibition; but ordered them to shew Cause the first Day of next Term. *Vide postea Hill. 9 W. 3. Trantor v. Duggan.*

Lands escheated are Part of the Manor.

Per Holt: A Tenancy escheat to the Lord it becomes Part of the Manor; but if the Lord purchase Part, it is only holden of the Manor, and not Part of it; but the Rent and Services are Part.

King and Elizabeth Ashly.

Order of Sessions need not appear to be made by Justices of the Division.

MOTION to quash an Order of Sessions; because it is not said that the Justices, by whom the Order was made, were of the Division. *Sed per Cur'*: That is but directory; for there may be no Justices of the Division. Division is not known in our Law, but of the Counties into Hundreds; and by that Expression in that Statute is meant to go to the next Justice.

Donford Attorney of K. B. and Ellys.

Trespass will lie for mean Profits after Recovery in Ejectment, tho' Writ of Error pending.

PLaintiff recovered in Ejectment at *York*; Defendant brought Writ of Error, and gave Bail according to the Stat. 16 & 17 *Car. 2. c. 8.* after which the Plaintiff, pending the Writ of Error, brought Trespass for the mean Profits; and *Cheshire* prayed the Court would stop this Action; for if Judgment be affirmed, or the Plaintiff in Error nonsuited, he is to have his Damages on a Writ of Enquiry, according to the same Statute; and if he should recover Damages in this Action, he would be doubly satisfied; but Court refused to stop the Plaintiff; for that it may be the Writ of Error was brought for Delay; and supposing it was not

not, and the Plaintiff recovered in Trespass, that Recovery might be given in Evidence to a Jury, on a Writ of Enquiry, to lessen the Damages.

Selby versus Russell.

DEBT on a Bond for the Performance of an Award; and it was insisted on for the Defendant, that the Award was void, because there was no final Determination of the Matter submitted, but several Things seem'd to be submitted to a future Determination; of which Opinion the Court seem'd to be; *Holt* saying, that where Matters are submitted, they ought to award all absolutely, without referring to any future Examination; and that he knew but one Case where Arbitrators may refer to a future Act; and that is, where they award the Payment of such Costs as an Officer of the Court shall tax, which has been allowed. *Sed adjourn'.*

Comb. 456.
Per Holt: Award should be absolute, without Reference to a future Examination.

King versus Griebe.

INformation at Common Law for wilful and corrupt Perjury; which sets forth, that there was a Trial in Replevin in the *C. B.* between *Richard* and *Cornesford*, wherein the Plaintiff, to maintain his Title, produced two Deeds of Lease and Release bearing Date the 15th and 16th of *July* 1681. which were witnessed by *Richard Strode*, who saw the Execution thereof at *Albemarle House*, about the Time of the Date thereof; and that the Defendant being produced as a Witness on the Part of *Cornesford*, the Defendant swore, that about the Middle of *July* 1681. he was at *Newnham*, *quandam domum vocat' Newnham in parochia de Plimpton Sanctæ Mariæ, in Com' Devon*, innuendo, *ubi revera* the said Mr. *Strode*, at any Time in the said Month of *July*, *non fuit apud Newnham præd'*. Defendant was found guilty; and upon Motion in Arrest of Judgment, the Court gave their Opinions *seriatim*. *Eyres*: I shall first consider, whether the Words laid to be spoken by the Defendant be certain enough, without the *Innuendo*, to make them material to the Point in Issue; and secondly, supposing them not to be so, whether the *Innuendo* will help it.

Sal. 513.
5 Mod. 343.
Pleadings.
Comb. 459.
Innuendo may explain a Thing that was certainly express'd before; else not.

1st, If

^{1st}, If a Man swears falsely in a Thing which is immaterial, it is no corrupt Perjury. 3 *Inst.* 164, 167. It is the Injury done to the Party, by the false Oath, that makes the Greatness of the Crime. 2 *Bulstrode* 150. 11 *Co.* 115. 1 *Cr.* 353. *Hob.* 53. 2 *Rol. Rep.* 369. *Yelv.* 111. 2 *Rol. Rol.* 41. By all which Cases it appears, that to make Perjury, the false Oath must be material to the Point in Issue; if *Strode's* being at *Newnham*, will not hinder his being at *Albemarle House*, then there is no Contradiction in his Evidence; and for ought appears, *Newnham* might be near *Albemarle House*; and if so, then it is not material. But the King's Counsel insisted, that tho' on Indictments on the Statute, it be necessary the false Oath should be material to the Point in Issue; yet is it not so on Indictments at Common Law; for there, tho' the Oath be immaterial, yet if it be false, it is Perjury: But I do not understand this Distinction; for the Statute does not alter the Nature of Perjury, but only inflicts a greater Penalty, disabling a Man, on a Conviction thereupon, to be a Witness; whereas at Common Law, the King may pardon the Guilt, and by Consequence may wipe away the Disability. The Case of *Howell Gwin*, *Style* 336. and *Parris's Case*, *Yelv.* 111. were Indictments at Common Law. ^{2dly}, The *Innuendo* will not supply it; for it is very unreasonable, that when a Man's own Words will not imply Perjury in themselves, that another Man's Construction should make them amount to it. The Case of the Manor of *Staverton* is very strong in this Matter, 3 *Cr.* 438. Where there is sufficient Matter before, to which an *Innuendo* may relate, there it may be ascertained thereby; but now in this Case, there is no precedent Matter to which it may relate, so that the *Innuendo* is altogether foreign, and imposes a Sense on a Man's Words which he never meant.

2 Cr. 126.

Turton of the same Opinion; and cited *Palmer* 535. *Sid.* 118. *Hetl.* 97. 2 *Rol. Rep.* 368. and said, it does not appear to concern the Matter in Question, or to be material; it had been proper to have ask'd him what *Newnham* he meant, and so to have brought it to a Certainty; but since it is not so, the *Innuendo* will not help it; and for that he cited 1 *Rol. Ab.* 83. 2 *Bulst.* 81, 82. 1 *Vent.* 339. *Yelv.* 21. 3 *Bulst.* 150. *Hob.* 45. *Hutt.* 44. *Rookby acc'*, All Matters charged in Matter of Crime ought to be certain; this is a Crime concerning a Place, but the Charge is not certain where the Place was.

Holt acc'; I am perswaded in my Conscience that he is guilty of a wilful and corrupt Perjury; and if I could, by
any

any Rules of Law, have given Judgment, I would. In Speaking to this Matter, I shall consider the Insufficiency of the Information, omitting the *Innuendo*; and so it is no more than if he had swore *Strode* was at *Newnham præd.* 2dly, With the *Innuendo*. 3dly, I shall consider the Assignment of the Perjury it self; whether the Perjury must not have a particular Relation to the *Newnham* mentioned in the *Innuendo*. 1st, If the *Innuendo* had been omitted, it had not been good; for *Newnham* must be understood a Vill, Hamlet, or Place out of a Vill; if you will ascertain a Will, you must shew in what County it is, for otherwise it is but an *Individuum vagum*, which is so very plain that there needs no Authority for it; but however I quote these two, 34 H. 6. 49, 60. 4 H. 8. 8. It is true, in some Cases the Vill must be in that County, by Intendment, in which the Action is brought; as in *Trespass in Middlesex*, 2 Co. 96. and the Place be laid in *Islington* generally, *Islington* shall be intended to be in *Middlesex*; but in collateral Matters, as in this Case, it is otherwise. All Courts must take Notice of Counties, but not of particular Villages; so that if *Newnham* be uncertain, and you assign the Perjury at *Newnham præd.* it is all uncertain. 2dly, The *Innuendo* cannot supply that Incertainty, for the *Innuendo* signifies otherwise than is signified by the Oath; what he swore does not at all import Mr. *Strode's* being at *Newnham* in *Devonshire*. *Newnham*, by common Intendment, is a Vill, and the *Innuendo* is of a House; no *Innuendo* can supply the Defect of any Certainty that was necessary before; for a bare and naked *Innuendo* signifies nothing, unless the Words themselves import the same; or there be some certain Fact to which it may be applied, or from whence it may be inferred, that the Man meant the Thing, without the Help of an *Innuendo*. There is a very good Account in 4 Co. 17. of the Use of an *Innuendo*. If the Words be actionable, it will serve to explain, and is of the same Use as *præd.* *Miles* and *Jacob's* Case, *Hob.* 6. and the *Anonymus* Case, 3 Cr. 428. which is the *King* and *Bowls*, the Roll whereof I have used, and find it to be according to the Report, and is exactly our Case; and there is surely as much Certainty required in Informations and Indictments, as in Actions on the Case. 1 Inst. 303. And it would be extraordinary, that a Man should not be liable in an Action for Damages for what he means, and yet be liable to be convicted on Perjury on an Information. If *Strode* had brought an Action for Slandering his Title to *Newnham*, and laid it in this

O o

Manner,

Manner, as this Information is, it would be naught; but he should say, that he was seised in Fee of a certain House called *Newnham*, in *Plimpton* in *Com' Devon*, and the Defendant spoke these Words, "Mr. *Strode* has no Title to *Newnham*, Innuendo *Newnham prædictam*", that had been good; for it is a sufficient Averment, and will have Relation to what was alledged before; here you would perjure a Man, not for what he swore, but for what he meant; and yet an *Innuendo* is never put in Issue, or any Body put to prove it, for it is but a Consequence of a certain Matter alledged before: If it had been said, that there was a Debate in the *C. B.* about *Strode's* being at *Newnham*, in *Plimpton* in *Devonshire*, then this Information *ubi revera, &c.* had been good; or if it had said, that *Strode* of *Newnham* in *Plimpton, &c.* was produced as a Witness, that *Griebe* had sworn he was at *Newnham, ubi revera non fuit apud Newnh' præd'*, that had been good; because there is something precedent, to which it may relate. 1 *Cro. Snowde* and *Snowde.* 1 *Roll. Ab.* 78. pl. 3. *Allen* 32. For *Innuendo* is no Averment but only a Relation, and there is nothing for it to relate to.

As to the Assignment of Perjury, you should have said, *ubi revera non fuit apud Newnham præd', seu ad aliquem alium locum sive Hamlettum vocat' Newnham*, then the Assignment of the Perjury had bore some Proportion with his Swearing.

Obj. It appears by his Swearing, that *Newnham* was some Place different from *Albemarle* House, and he swore in Contradiction to *Strode's* Evidence. As to that, I think a false Oath, any Way conducive to the Matter in Issue, or a Guide to the Jury, tho' it be but circumstantial, is Perjury; but for any Thing appears, this was no Contradiction to *Strode's* Evidence, for *Albemarle* House and *Newnham* may be near one another: If it be Matter that tends to the Discovery of Truth, tho' but a Circumstance, as that such a one wore a Blew Coat, whereas he wore a Red, it is Perjury; but if he tells an impertinent Story nothing to the Purpose, then it is not so. If a Man speaks to the Credit of a Witness, which is not directly to the Issue, yet if false, that is Perjury. It was further objected, that the *Innuendo* shall be rejected as Surplusage; but that cannot be, for by the *ubi revera* you have put the Case on his not being at *Newnham* in *Plimpton, &c.* and so have made *Innuendo* signi-

At a Trial,
the Question
was upon Mo-
ney lent, and
it being objec-
ted, that it was
improbable
the Plaintiff,
being a cau-

tious Man, should lend such a Sum without a Note; a Witness was produced to prove that he had lent a greater Sum to a Person then in Court, without a Note; which Person swore he did not; and upon Motion to file an Information of Perjury against him for the Oath, Court held it reasonable.
Mich. 4 Ann. in B. R.

ficant, and therefore it cannot be left out. They objected further, that there was a Verdict, but that cannot help; for it is against the Rules of Law to put a Man's Intent in Issue; and what cannot be proved, or put in Issue, the Verdict cannot find. Then as to this being an Information at Common Law, there is no Reason why that should not be as certain as if it were on a Statute: The Statute makes no new Offence, but only gives a new Punishment in those Cases to which it extends. Perjury at Common Law was an infamous Fact before any Statute made; the first of which is 11 H. 7. the Punishment by Statute is much the same as at Common Law, but in some Instances it varies; by Statute, if a Man pays 20*l.* he shall not be set in the Pillory; but at Common Law he may, and be fin'd a greater Sum; it is Part of the Judgment by the Statute, that he should be disabled from being a Witness, and that the King cannot pardon; but the same Certainty is required in both; therefore let Judgment be arrested.

In the Case of
Rex v. Franklin, Mich. 3
Geo. 3. Lord
C. J. *Raymond*
said this Case
was reversed
in the House
of Lords.

Terremoulin and Sandys.

Sandys was Proprietor of a Ship, called the *Constant Mary* in the Year 1689. and sent her to Sea, where she was taken off of *Yarmouth Super altum mare* by *Dubart a Dunkirker*, who sold her to *Terremoulin*; and after which, the Ship being at *Spithead*, *Sandys* seisd her by the Admiralty Process, whereon there was Suit commenced in the Admiralty Court by *Sandys*, in *causa proprietatis* against the said Ship; and then *Terremoulin* came in *pro interesse suo*, and suggests, that the Ship was his, and that he had been in Possession of her three Years last past, and prayed his Possession might be restored; whereupon *Sandys* put in his Libel, that he was possessed of the said Ship divers Years till 1689. that then the said Ship was forcibly taken away from him, without saying *Super altum mare*, and thereupon pray'd Restitution. *Terremoulin* comes in and replies, that the Ship was taken by *Dubart*, *Super altum mare*, who sold it to him at *Bergen* in *Norway*; *Sandys* rejoins, that after the Taking, the Ship was never condemn'd Prize, and so his Property still continued: According to which, after Examination of the Case, the Admiralty gave Judgment for *Sandys*; for a Capture without Condemnation alters not the Property by their Law; whereupon *Terremoulin* appeal'd to the Delegates; and now against his own Appeal prayed a Prohibition. *Per Holt*:

Carth. 423.
Libel did not
shew that the
Capture of a
Ship was *Super
altum mare*,
the subsequent
Proceedings
did; Court
divided whe-
ther Prohibi-
tion should go.

1 Vent. 308.

Ante p. 135.

Ante p. 134.

Ante p. 135.
1 Vent. 308,
174.

Holt: The Libel does not say, that the violent taking away was at Sea; and if it was not, what have the Admiralty to do with it, and how can it be cured by any subsequent Matter; for if the Admiralty have not Conusance of the original Cause, tho' a Civil Law Question arise, they shall not have Jurisdiction; and if they have Jurisdiction, and a Common Law Question arise, yet they shall determine it; and *per Holt* and *Rookby*, a Prohibition should go, because the Libel was a bare Replevin at Common Law. But *Turton* and *Eyres* held otherwise; because it appeared by subsequent Allegation, that the Capture was *Super altum mare*; and so Rule for Prohibition was discharged.

Sutton versus Moody.

Salk. 556.
Comb. 458.
5 Mod. 375.
Vide Just. Inf.
Lib. 1. Tit. 1.
S. 12.
Property of
'Things *feræ
naturæ* is in
the Owner of
the Soil, while
they are there.

TRespafs *Quare clausum fregit & ibidem venatus est & cuniculos suos cepit.* Verdict *pro Quer'*, and intire Damages given; and moved in Arrest of Judgment that the Count was ill; because the Owner of the Ground hath no Property in the Conies, and therefore cannot be said *suos*; and cited 1 Cr. 553. But on the other Side it was said, that Precedents were both Ways; and cited 1 Brownl. 167. Godb. 174. *Newton* and *Richards*; and *per Holt*, *Warrenna* is a Property *ratione privilegii*, and then there is a Property *ratione soli*, both which Properties are local. Now a Man may have a Warren in another Man's Ground; as a Man may have Warren by Grant or Prescription in his own Ground, after which he may alien the Ground, and reserve the Liberty of the Warren; which Liberty *ratione privilegii* destroys or rather suspends the Privilege *ratione soli*; so that the Property of the Conies is in him that has the Warren; whereas otherwise the Property of the Conies, whether wild or *tame*, is in the Owner of the Ground where they are, while they continue there, as much as if he had a Warren, the Warren making not the Conies to be more or less his; the Privilege of a Warren only giving a Man Liberty to imploy his Ground in the Keeping of Conies, which otherwise he cannot do. *Jud' pro Quer'.*

Note; This Case was quoted and agreed for Law in B.R. Mich. 4 Ann. in the Case of *Keble v. Hickeringle.*

Greenhill versus Sheppherd.

IF the Defendant pleads a Plea in Abatement, and Plaintiff confesses it, the Plaintiff thereby saves Costs. *Per Cur'.* If Plaintiff confesses a Plea in Abatement he saves Costs.

Sutton versus Moody.

WHEN we gave Judgment in this Case I mentioned ^{12 H. 8. f. 9.} which was this: One hunted in a Forest and rous'd a Deer therein, and ran him into another Man's Ground, and the Forester made fresh Pursuit; and it was held, that in regard the Forest was a Place of Privilege, the Forester making fresh Pursuit, he may retake the Deer in another Man's Ground; they held also, that if ^{2 Bull. 60.} a Man starts Game in his own Ground, and hunts it into his ^{1 Brown 224.} Neighbour's Ground, and there kills it, yet in Regard of ^{Latch 120.} his first Starting and Pursuit, the Property is still in him; and ^{Cro. Ja. 324.} it may be inferred from that Case, that if I start Game in ^{Poph. 162 & 163.} one Man's Ground which is not my own, and hunt it into another Man's Ground, and there kill it, the Property is in me; because the Party, in whose Ground it was started, having no Privilege, he cannot come and take it. I will also Mind you of a Case, *Pasch. 23 C. 2. Ashford and Polluxfen*, in this Court; Trespass *quare piscatus est in piscaria*, ^{3 Lev. 227.} without saying *separali* or *libera*, and *pisces suos cepit*, which after Verdict was held well; tho' in a several Piscary, the Fish are as much at Liberty as Game on any common Ground.

Greenwell and The Censor of the College of Physicians.

TRESPASS for a false Imprisonment. Defendant pleaded ^{Carth. 421.} *quod recordatum existit in scriptis*, &c. that he was ^{Where a} convicted *pro mala praxi* before them, for which they ^{Thing is not} committed him to *Newgate*, &c. and now moved for the ^{by Law to} Plaintiff, that they might have a Sight and a Copy of the ^{be shewn in} Conviction, for otherwise it would be impossible for them ^{Court, Oyer} to reply; for seeing they had not pleaded a *Profert*, they ^{cannot be de-} could not have Oyer. *Holt*: We are of Opinion, we cannot ^{manded of it,} oblige them so to do; because it would be contrary to all ^{or a Copy.}

P p

Rule;

Postea Pasch.
12 W. 3. Dr.
Greenville v.
College of
Physicians.

Rule ; for where a Release or other Thing is pleaded, and it is not by Law to be shewn in Court, there you cannot crave Oyer, or demand a Copy thereof. And this is different from the Case of Copies of Court-Roll, or a Book of a Corporation ; for if an Issue be to be tried concerning a Copyhold, the Copyholder shall take Copies of the Rolls ; because he has an Interest in the Rolls of the Manor to make out his Title ; so of an Action of a false Return against a Corporation, when a Man is turn'd out, the Books of the Corporation are publick Things, and concern him, and therefore on a Trial he hath Liberty to take Copies. If you think the Conviction in this Case not justifiable, you may remove it hither by *Certiorari*.

Smallcomb versus Sir Owen Buckingham ; and versus Mills late Vicecom' Lond' and Crosse.

Carth. 419.
Salk. 320.
Execution.
The first *Fi' fac'* delivered to the Sheriff, should be first executed ; but if he executes the last first, the Execution is good ; and the Party must have his Remedy against him.

THE Case was this: One Fox was indebted to the Plaintiff, and gave him a Judgment ; upon which a *Fi' fac'* was taken out, which bore *Teste* the 31st of January, and was delivered to the Sheriff the Day after ; who took Fox's Goods in Execution thereon, and made a Bargain and Sale of the same, and the Bargainee assigned them to the Plaintiff ; but it happen'd, that the Defendant Crosse took out a *Fi' fac'* against the same Fox, tested after the Plaintiff's, but delivered an Hour before his, on which the Sheriff took in Execution the Goods of Fox so bargained and sold, and in the Plaintiff's Hand, for which he brought Trover. This Case was tried at *Guild-hall*, and a Case was made of it, for to have the Opinion of the Court ; and they all agreed, that if there be two *Fi' facias's*, and one be delivered to the Sheriff one Day, and the other another Day, and the Sheriff first executes the last *Fi' fac'*, that the Execution is good, and the Sale thereupon good ; and he, who delivered his first, must have his Remedy against the Sheriff ; because otherwise the Consequence would be mischievous, and the Execution of the Law would be perilous to Buyers ; the Meaing of binding of the Goods by a *Fi' fac'* being only in Relation to the Party himself, and not only to the Execution of the Law : As suppose, before the Statute, a Man took Execution the first Day of the Term, and within a Week after another took out a second *Fi' fa'* against the same Person, tested a Week after, and he that has the first *Fi' fac'* will keep it in his Pocket, and the other goes and

and delivers his to the Sheriff, and gets it executed, is it any Reason, that he that had the first shall come and defeat thereby the Execution of the second; but if he delivers it to the Sheriff, and the Sheriff executes the second, and omits the first, then may he have his Remedy against the Sheriff for the Wrong done him; now here in this Case, we doubt not but upon this Statute, there is a *Prius & Posterius* in a Day; and that if the two *Fieri facias's* are delivered to the Sheriff on one Day, he hath not Election, but ought to execute the Writ first delivered to him; but if the Sheriff doth execute the last first, the Execution is good; and he who had the first Writ must have his Remedy against the Sheriff, if he hath done him any Wrong thereby; tho' we do not think he hath done him any in this Case, because he who had the first Writ never desired any Warrant from the Sheriff; and it is plain was designed purely as a Screen to preserve the Party from the Execution of the second *Fi fac'*; therefore let the Plaintiff have his Judgment.

Winter versus Lovedurr.

EJoctment; special Verdict, that the Lands in the Declaration are Customary Lands, Part of the Manor of G. demisable Time out of Mind by Copy of Court-Roll, for Life or Lives, at the Will of the Lord, according to the Custom of the Manor. That *George Pawlett Esq;* was seisd of the said Manor in Fee, and had Issue *Edw. Pawlett*; that the 7th of *January 9 Jac.* *George Pawlett* by Deed indented between him and *Elizabeth* his Wife on the first Part, *Hugh Worth* of the second, and *Dorothy Worth* his Daughter on the third Part, in Consideration of a Marriage to be had between *Edward Pawlett* and *Dorothy Worth*, and of a Portion to be paid, conveyed the said Manor, and divers other Lands in *B.* and *S.* to the Use of himself for Life; then to *Edward Pawlett* in Tail; Remainder to him and his own right Heirs; with this *Proviso*, (whereon the Question depends), that it shall be lawful for the said *George Pawlett*, during his natural Life, and after his Decease, to the said *Elizabeth* his Wife, during her Life, by their several Deeds indented, to demise the said Lands, or any Part thereof, either in Possession for one, two or three Lives, or for the Term of thirty Years; or for any other Term or Number of Years determinable on one, two or three Lives; or in Reversion for one or two Lives, or for the

Salk. 537.
Carth. 427.
2 Mod. 244,
378.
Copyhold
Lands are Parcel of the Demesnes of the Manor.

the Term of thirty Years, or for any other Term or Number determinable on one or two Lives; so as the said Demise shall not be made of any Antient Demesne Lands Parcel of the Premises; or of any other Lands, which for the Space of seven Years last past have been used as the Demesne Lands of the Manor, and so as the antient Rent be reserved. They find, that the Marriage between *Edward* and *Dorothy* took Effect; that *Edward Pawlett* had Issue four Daughters and no Son, viz. *Mary*, *Anne*, *Sarah* and *Katherine*; that *Mary* married *James Glasseybrook*, who are the Lessors of the Plaintiff; then they find, that *George Pawlett* by Indenture 20th of *March* 11 *Car.* 1. between him and *Robert Blanchflower*, reciting, that *Richard Blanchflower* held the Lands in Question by Copy of Court-Roll for his own Life, and the Life of *Joan* his Wife, granted the same in Consideration of 60 *l.* to *Robert Blanchflower*, from and after the Death, Forfeiture, or other Determination of the Estate of *Richard Blanchflower*, and *Joan* his Wife, for the Term of thirty Years; they find the Marriage-Money paid; that at the Time of the said Demise, these Lands were Copyhold Lands, Parcel of the said Manor of *G.* They find, that there is a Capital Messuage, and divers Acres of Land, Parcel of that Manor, which were always held in Demesne; then they find the Death of *G. Pawlett*, *Eliz. Pawlett*, *Rich. Blanchflower* and *Joan* his Wife; that *Robert Blanchflower* enter'd, and was possess'd of these Lands, by Virtue of which he assign'd to the Defendant *Lovedurr*, and then conclude specially. *Eyres*: The Case is but this: Tenant for Life, Remainder in Tail of a Manor, with Power in Tenant in Tail of the Manor to make Leases in Reversion for one or two Lives, or for the Term of thirty Years, or any Number of Years determinable on one or two Lives; so that such Demise be not of the Antient Demesne Lands, rendring the antient Rent; then Tenant for Life makes a Lease of a Copyhold Estate of the said Manor for thirty Years, to commence after the Determination of the Estate of two Persons, whose Lives were then upon it; whereupon the general Question is, whether this be a good Lease according to the said Power; which subdivides it self into two Questions, 1st, Whether it warrants a Lease in Reversion for thirty Years absolute. 2. Admitting it doth, Whether this Power warrants a Lease of Copyhold Estate. And *per Eyres* and *Turton*, this Power warrants a Lease for thirty Years absolute; because the Words themselves are exprefs, and cannot without Force be otherwise understood;

stood; for the Leases in Reversion are to be for one or two Lives, or for thirty Years, or for any Number of Years, determinable on one or two Lives; which are three distinct Limitations, different from each other, and so different from *Finche's Case*, 6 Co. 39. the Reduplication of the Particle (or) making them plainly distinct; and if the second Paragraph should be connected with the third, then the Particularizing of the thirty Years would be to no Purpose, because included in the general Term of any Number of Years. Then as to the second Question, we are of Opinion that this Power does not warrant the Leasing of the Copyhold Lands, being restrained with the *Ita quod* such Demise be not made of the Demesne Lands; because the Copyhold Lands are Part of the Demesne Lands of a Manor, the Freehold being in the Lord, and the Copyholders only Tenants at Will; and therefore if the Lord aliens his Manor, there needs no more Attornment of the Copyholders, than of the Tenants at Will. *Litt. Sect.* 553. 1 *Inst.* 311. a. The Lord has as much the Demesnes of a Copyhold, as of that which is in his own Hands actually. 2 Cr. 559. 4 Co. 26. Wherefore by Reason of this last Point Judgment ought to be given for the Plaintiff.

Rookby: I concur the Lease is not good, but from different Premises; for as to the Question, whether Copyhold Land be included within the Demesne Lands, I agree it to be so; not because Copyhold Lands are in Law within the Demesne Lands of the Manor, for in vulgar Speech sometime they are not so, but because to understand them otherwise would contradict the Intention of the Parties, which without Doubt was not to destroy the Copyholds, as such Leases for Years would do. Then as to the other Question; an absolute Lease for thirty Years in Reversion is not warranted by this Power, because then a better Lease might be made in Reversion than Possession. If Leases should be made of Copyholds in this Manner, the Manor would be destroyed, which could never be intended; and all Powers ought to be taken strictly, according to *Slocomb* and *Hawkin's Case*. *Yel.* 222. 2 Cr. 328. *Jud' pro Quer'.*

Holt: That the Lease is not good, for the Reasons of *Eyres* and *Turton*. Two Questions have been made. 1st, Whether this Term be within the Power. 2. Whether these Lands be within the Exception or Qualification of the Power. As to the first, I am of Opinion, that the Term is warranted by the Power, which depends on the Penning thereof, wherein, by Way of Explication, it is necessary to take Notice

Q q

what

6 Co. 39.

what is meant by a Lease in Reversion. 1st, In the largest Sense it is taken for any Lease for Years to commence *in futuro*, or at a Day to come; as 1 *Inst.* 54. Reversion being there taken in Opposition to Possession. But that is not meant in this Case, because then he might make a Lease to commence fifty or sixty Years hence; and therefore this Power must be taken according to the common and second Signification of the Word, which is a Lease to commence from and after the Determination of a present Interest then in Being; as suppose there be a Lease for Life or Years then in Being, and a Lease for Years be granted on the Determination of that Estate, this is a Lease in Reversion; but the Lease in Reversion in this Power is not only to be taken in this Sense, because it not only extends to a Lease for Years in Reversion, but also to a Lease for Life in Reversion, or a concurrent Lease with the Estate in Being; so that these Words *in Reversion* have two Senses; as to the Years, it is a future Interest; as to the Lives, a concurrent Lease. But now as to the Lease, as this Power is penn'd; a Lease in Reversion for thirty Years absolute is good, and is not within the Reason of *Finche's Case*; nay there is a Distinction in that Case which confirms my Opinion, and the plain Meaning of the Words can be no other; the same Words are used in the Power, both with Respect to the Leases in Possession and Reversion; in both which there are three distinct Powers perfectly different from each other; and repeating the Word (*for*) wholly disjoins the former and the later Part. *The King and Lewis*, 1 *Lev.* 119. and *Brooker and Robotham's* cited in that Case, are pertinent to this Purpose; and prove, that subsequent Words shall not control general precedent ones, but that they shall both be construed as general and independent Clauses. But then as to the second Point; I hold these Lands to be within the Exception, or Qualification of the Power; for all the Demesne Lands generally are excepted, and without Doubt Copyhold Lands are Parcel of the Demesnes. 1 *Co.* 46. *b.* It would have been unreasonable, that Tenant for Life should have Power to destroy the Manor for ever; the Meaning here was to have Power to make Estates, renewing the antient Rents; Copyholds needed no such Power, because Custom enables you to demise them. But Obj. If the Copyhold Lands shall be construed to be exempted, then there is nothing left for the Power to work upon; for according to the Power, the antient Rent must be reserved; and a Manor only consists of Demesnes and Services; and if you pare away the

Demesnes

Demefnes by the Exception, you have nothing for the Power to work upon, because a Rent cannot be reserved out of the Services. But as to that I answer, there are other Lands out of which a Rent may be reserved, as the Lands in *B. &c.* and even as to the Manor, the Power is not wholly void, for he may thereby lose the Rents and Services, tho' no Rent can be reserved thereout; for where a Man doth reserve a Power to make Leases of divers Lands and Tenements, and other Things, and there is a Qualification in the Power, which extends not to all comprehended in the Power, that Part of the Power may be executed without pursuing the Qualification; so is *2 Rol. Ab. 262.* A Man made a Settlement to the Use of himself for Life, with Remainder over, and a Power to make Leases, reserving so much Rent, as was reserved two Years before the making of this Settlement; the Man made a Lease of Lands, not demised for twenty Years before; and this Lease was held good, and to be within the Power, and that he might reserve what Rent he would; because tho' the Qualification was in general Words, yet it could only be applicable to such Lands as were demised. On the Authority of this Case was determined another *Hill. 27, 28 Ca. 2.* in *Hale's* Time, *Walker and Walker*: A Man made a Settlement of Lands, and also of Tithes, with a *Proviso* of making Leases in Possession or Reversion of all or every Part of the Premises, reserving 5 s. Rent for every Acre; he made a Lease of the Tithes reserving about 5 l. *per Annum*; and Question was, whether this was a good Lease of the Tithes within the Power; and held, that a Lease of the Tithes was good, without reserving any Rent at all; because the general Words of the Qualification should be restrained to that only to which it was applicable; so in this Case, tho' the Qualification cannot operate on a Lease of the Rents and Services, because no Rent can be reserved thereout; yet the Power it self may operate thereon, and the Qualification be extended to those other Things to which it is applicable. Therefore *Jud' pro Quer'.*

Vide. 1 Vent.

294.

2 Lev. 150.

Turberville and Stamp.

ACTION *sur* Case on the Custom of the Realm, for negligent keeping of his Fire; and that the Plaintiff was possessed of a Close of Heath, and the Defendant possessed of another Close next adjoining; and that the Defendant

Salk. 13.

Comb. 459.

Carth. 407.

Skin. 681.

Case for neg-

ligently keep-

ing his Fire.

tam improvidè custodivit ignem suum in his Field, that it burnt the Plaintiff's Heath in his Field; after Verdict for the Plaintiff, it was moved in Arrest of Judgment, that such an Action on the Case lies only for a negligent Keeping his Fire in his House; and that in this Case he should have his Action specially, if he be damaged, and not counted on the general Custom for Negligence; & *per Turton* Justice, there is Difference between Fire in a Man's House, and in the Fields: In some Countries it is a necessary Part of Husbandry to make Fire in the Ground; and some unavoidable Accident may carry it into a Neighbour's Ground and do Injury there; and this Fire not being so properly in his Custody as the Fire in his House, I think this not actionable, as it is laid. But *per Holt, Rookby* and *Eyres*; Every Man must so use his own, as not to injure another, the Law is general; the Fire which a Man makes in the Fields, is as much his Fire as his Fire in his House; it is made on his Ground, with his Materials, and by his Order; and he must at his Peril take Care that it does not, through his Neglect, injure his Neighbour: If he kindles it at a proper Time and Place, and the Violence of the Wind carries it into his Neighbour's Ground, and prejudices him, this is fit to be given in Evidence. But now here it is found to have been by his Negligence; and it is the same as if it had been in his House: *Jud' pro Quer'.*

Giles versus Hart.

Salk. 622.
Carth. 413.
Comb. 443.
Touts temps
prist cannot be
pleaded after
Imparlance.

Ante p. 8.

IND E B' *Assump'*, and *Quantum meruit* for Goods sold, wherein a Request was laid, both as to Time and Place; Defendant pleaded *Non assumpsit* to all, except 13 l. and as to that pleads, that after the Time of making the Promise, viz. 22 April, which was before the Time of the Request alledged, he tender'd the said 13 l. which the Plaintiff then and there refus'd to receive; and that from that Day he was always ready to pay the Money, and brings it into Court; whereon the Plaintiff demurr'd; alledging, that suppose a Tender might be pleaded in Bar of an *Assumpsit*, yet it is not good, without answering the special Request alledged, which is not done in this Case. And *per Holt*; We are all of Opinion that the Defendant's Plea is ill; because the Defendant should plead, that he was always ready from the Time that the Money was due, which he cannot after Imparlance; it is not material for the Plaintiff to set forth a Time

a Time of Request till he comes to his Replication; and when the Defendant says he was always ready, that puts the Plaintiff in his Replication to shew a special Request, and that the Defendant did not then pay him, and so the Plaintiff must have his Damages. The Way in Debt is for the Defendant in all these Cases to plead *touts temps prist* before Imparlance, and pray *Jud' de damnis*. And since Actions of Debt are turn'd into Actions *sur Case*, it is but reasonable the Defendant should still have the same Advantages: But then the Question is, how he shall plead; whether in Bar of the Action, demanding Judgment *si actio*; or in Bar of the Damages, praying *Jud' de damnis*. Now it is reasonable in Debt to pray it in Bar of Damages, because there the Damages are but Accessary; but now in an *Assumpsit* Damages are the Principal; therefore why should it not be thus pleaded, *viz.* to confess the Damages due, and bring them into Court, and pray *Judicium de ulterioribus damnis*; indeed no Body hath ventur'd to plead thus, but have chose rather by Motion to bring the Money into Court; but however the right Method be, the Defendant in this Case has pleaded ill; and therefore *Jud' pro Quer'*.

If Judgment be given for Defendant in King's Bench, and a Writ of Error be brought thereon, and Judgment reversed in Exchequer Chamber, the Exchequer Chamber must give the Interlocutory Judgment *quod quer' recuperet*, and this Court award the Writ of Enquiry of Damages; and so is *Faldo and Ridge's Case* in *Yelv.* 74. 2 Cr. 206.

Error in Ex-
chequer
Chamber on
Judgment for
Defendant in
B. R.

Ashton versus Sherman & Ux' Administrators of Field.

DEBT on a Bond of the Intestate's; Defendants plead, that *Field* the Intestate 5th of July 5 W. & M. became indebted in 100 l. to *Rich. Wareing*, for which *Wareing* had a Judgment of 100 l. and 30 s. Costs, and also a Judgment to one *Axtell*; and they set forth several other Judgments and Bonds, and that they have not Assets *ultra*. The Plaintiff replies severally to every the said Judgments, and as to six of them, pleaded they were kept on Foot *per fraudem*, and as to the two Judgments of *Wareing* and *Axtrell*, that the Defendants had Assets to satisfy him, besides Goods to satisfy *Wareing* and *Axtrell*, *de separalibus debitis & damnis suis predictis versus ipsos Johannem Sherman & Mariam*

Salk. 298.
Comb. 444
& 449.
Carth. 429.
Pleading six
Judgments,
confesses As-
sets for above
five; and if
Plaintiff in
his Replica-
tion concludes
to the Coun-
try, 'tis ill.

R r

uxorem

Uxorem ejus, sicut præfertur, recuperat'; & *hoc petit quod inquirat' per patriam*; whereupon the Defendant demurr'd specially, because the Replication was double; Plaintiff joined in Demurrer. And *Holt* delivered the Opinion of the Court, and said, In this the Defendant Executor has pleaded in Bar several Judgments, the Plaintiff hath replied to them severally, which he *may well do*; for he may at his Election reply to one; some; or all; but then the Plaintiff hath not done well in this. He hath pleaded to some Judgments, that they were kept on Foot by Fraud; and as to the other, that he has Assets *ultra*; & *hoc petit quod inquiratur per patriam*; and concluding to the Country is naught, because the Defendant hath confess'd by his Plea already; that he hath Assets *ultra* those Judgments: As for Instance; a Man pleads three Judgments, the Plaintiff replies as to two, that they are kept on Foot by Fraud, as to the third, that the Defendant hath Assets *ultra*; & *hoc petit quod inquiratur per patriam*; in this Case, first saying Assets *ultra* is not good, because it is only an Allegation of that which he hath already confess'd; for by Pleading three Judgments he confesses Assets above two; and then driving him on to an Issue is ill; for the same Reason therefore you should have omitted the Assets *ultra*, and the Conclusion to the Country, and relied on the other Judgments, that they were kept on Foot by Fraud; or you should have said generally Assets *ultra*; & *hoc paratus est verificare*. It might have been rejected as Surplussage, but here you have driven them to an ill Issue, which cannot be good; but because the Precedents have been this Way, as *Hancock* and *Proud's Case*, 1 *Saund.* 336. we will give the Plaintiff Leave to discontinue, paying Costs. After which, by Consent of Parties, a Rule was given that Plaintiff should have Leave to amend, paying Costs.

King versus Lambert.

Information filed without Recognizance entered into by the Party is ill; but the Court cannot take it off the File.

MOTION was made last Term for filing an Information against *Lambert*, for Subornation of Perjury, on an *Affidavit* of his suborning two Persons; but the Rule was drawn up generally, and an Information was filed for suborning those two, and ten others; and it was moved that this Information was not duly filed, because the Addition of ten more, were ten more Informations; and the Court declared, that no Information should have been filed, but as to those Persons mentioned in the *Affidavits*; every Subor-

nation

nation is a distinct Offence; and the Act for Information does not direct an *Affidavit*; yet the Court being trusted with it, and the Parliament reposing in them, they ought to do it on good Grounds. Then it was moved the Information was ill as to those Persons, because the Statute requires a Recognizance to be enter'd into to the Party, which they had not done; to which also the Court agreed. But a Doubt arose, what should be done with this Information which is now filed. *Holt* saying it could not be quashed, or taken off of the File; for when once a Thing is on the File, it cannot be taken off without an Act of Parliament; no, not by Consent of Parties; as in the Case of Dr. *Widdrington* on a *Mandamus*; the College made a very scandalous Return, and which he and the College agreed; and then they moved to take the Return of the File; but the Court refused it, saying it could not be done without an Act of Parliament, only they ordered a *Vacat* to be entered thereupon. That in this Case the Method may be to enter the Irregularity on the Roll with a *Cessat processus superinde: Sed Cur' advisare vult.*

Postea Hill.
12 & 13 W. 3.
The King v.
Sir Hugh E-
verard.

Brown and Burlace.

CASE for rescuing *Burlace*, who was arrested by the Sheriff of *London's* Officers in the *Middle-Temple*; and it was moved that the Inns of Courts were privileged, as appears from *Dugdale's Orig. Jur.* 317, 320, 322. and because that the *Temple* is out of the City of *London*, as may be seen by *Stow's Survey*, fol. But per *Holt*; 'Tho' the *Temple* be not within the City of *London*, yet it is within the County of *London*, as appears, for that all Felonies committed in the *Temple* are tried in the *Old-Bailey*; and every Place in *England* must be within some County; Places may be extraparochial, but not out of County. Formerly *Black-Fryers* were not within the Franchise of the City, yet it is and always was within the County of *London*. Bailiffs indeed should not come in to disturb People when they come to their Counsel, or to enter into Chambers to the Disturbance of Study, or Danger of Papers and Evidences that are frequently in Counsel's Hands; but then the Way is to submit to the Process of Law, and to apply to the Judges, who will redress Abuses of that Kind, by laying Bailiffs by the Heels; but there is no Pretence to extend this Privilege to shelter ill People, as in this Case, *Burlace* came from

Skin. 684.
Temple no
privileged
Place.

Grays-

Jo. 271.

Grays-Inn, but had no Certificate from the Treasurer, as should be in all Cases of Removal; besides, no Exemption is good, without setting up a Jurisdiction to do Justice. Let Defendant find special Bail.

Evans versus Martell.

Merchant.
By Bill of
Loading the
Property is
consign'd, and
not by the
Envoyce.

ACTION against the Part-owners of a Ship, called the *Upton Galley*, tried at *Guild-hall*, Verdict for Plaintiff; and this Point was saved to the Defendants; one *Harvey* loaded the Goods, for which the Plaintiff brought his Action, and consigned them to the Plaintiff by a Bill of Loading, but the Goods appeared, by the Envoyces, to be *Harvey's*; and the Question was, whether *Harvey* or *Evans* should bring the Action; and the Court was of Opinion, that the Envoyces signified nothing; but that the Consignment in a Bill of Loading gives the Property, except where it is for the Account of another; so that if a Bill of Loading be made to *A*. *A*. hath thereby an Ownership to maintain an Action; but if it be to *A*. for the Account of *B*. then *A*. is only *B*'s Factor, and *B*. hath the Ownership, and must bring the Action; and in this Case the Action is well brought by Plaintiff.

King versus Harrison and Duke.

Judgment for
a Corporal
Punishment
not to be gi-
ven in the Ab-
sence of the
Party.

Vide Keyl.
Rep. Mau-
gridge's Case.
Ante p. 142,
143.

THEY were convicted and outlawed on Informations of Perjury, and the Exigent filed; and it was moved, that the Court would pronounce Judgment on the Defendants, seeing the Prosecutor could go no farther; but the Court said, they never knew any Judgment given for a Corporal Punishment, even in the Case of an Outlawry, in the Absence of the Party; when a Man is outlawed for Felony, there is never any Award of Execution against him till he be brought to the Bar; and since in this Case a Corporal Punishment would be Part of the Sentence, they could not do it; and that upon Search Sir *Sam. Ashtree* could find no such Precedent.

West versus Cole.

PLaintiff counted, that the Defendant 6th of May 1695. Ante p. 127. in Consideration that the Plaintiff had provided him Where two Promises are laid, one well, the other ill; that which is ill laid shall not vitiate what is well laid, unless it appears to be for the same Thing. Diet for the Space of 120 Weeks *tunc praterit*, promised to pay him 7s. *per* Week, and that the Defendant *postea, scil* 6th of May 1695. in Consideration that the Plaintiff had found him Diet for the Space of 120 Weeks *tunc praterit*, promised to pay the Plaintiff *tantum quantum mereret* for the said Weeks; and moved in Arrest of Judgment, that the Defendant is twice charged for the same Thing, the 120 Weeks in the *Quantum meruit* being not said to be others from those in the special Promise, as it is usually said in those Cases. But the Court held, that tho' (*aliis*) be generally said, yet seeing it did not appear they were the same, for there is no precise Time laid when these 120 Weeks were, they will not intend them so as to destroy a Promise otherwise well laid; and therefore the Plaintiff had Judgment.

L'Isle versus Armstrong.

APPEAL of Death by L. as Brother and Heir, brought Appeal. by Bill at *Carlisle*, and remov'd into this Court by *Certiorari*; Defendant pleaded, that the same Session of Gaol-delivery at *Carlisle*, wherein this Appeal was commenced, he was tried for the same Cause on an Indictment of Murder, and found guilty of Manlaughter; and thereon prayed the Benefit of his Clergy, which was refused him there; and the Record was removed into this Court, where he had his Clergy in *Hillary* Term last, before the Plaintiff prayed he should plead to the Appeal. Plaintiff replied, that when this Appeal was brought at *Carlisle*, as appears by the Record of this Court, he requested the Appellee to plead, but that he refused so to do. And *per Holt*; *Auterfoits* convict or acquit on an Indictment, was a Bar at Common Law to an Appeal, because no Man's Life should be indanger'd twice for the same Offence; and the Judges proceeding first on the Appeal was meerly discretionary, the very Preamble of 3 H. 7. saying, that it was only an Usage among them so to do; which Statute obliges the Judges to proceed within the Year and Day to hear and determine the Indict-
S f ment,

Salk. 60.
Comb. 410.
If a Man is indicted of Murder, and found guilty of Manslaughter, Appeal will lie the same Sessions; and if by Default of the Court he has not his Clergy, it shall not prejudice him.

Ante p. 159.

ment, and not to stay on the Account of an Appeal; without saying, to be brought, or already brought, or whether of both. But say you, shall he not then answer to the Appeal? Yes certainly, the same Sessions. If he pleads Not guilty, the Judges may proceed and try him *de novo*, and hang him on the Appeal: If he pleads *Auterfoits* convict, it is no Bar: If he will not answer over, his standing Mute must be recorded, and Judgment given accordingly, either to be hang'd by *Nil dicit*, or the *Peine fort & dure*. But if you are not ready, and cannot go on with your Appeal, I am afraid your Appeal will be gone. Neither an Acquittal nor an Attainder upon an Indictment shall be a Bar to an Appeal, as it was at Common Law, but only the having Clergy; which has been extended so far, that if a Man prays his Clergy, and the Court does not give it him, he having done what lies in his Power, the Delay of the Court shall not prejudice him: Now in this Case there is no Prayer made to have his Clergy; but how comes that to pass? Why, the Party was never ask'd; and if the Court will not proceed to Judgment, and call him down to Judgment, he hath no Opportunity to ask his Clergy; and therefore I think it a good Plea in Bar; of which Opinion were the other three Justices; and so the Appellee was discharged.

Holt: You have four Days after the *Postea* is actually returned to move in Arrest of Judgment.

Per Cur': No Motion for a new Trial, or to set aside a Writ of Inquiry of Damages, after Motion in Arrest of Judgment.

If an Award be made by Rule of Court, and the Party, who refuses to obey the Award, absconds, so that he cannot be found on a Week-day, a Service thereof on a Sunday is sufficient to bring him into Contempt, whereon to have an Attachment.

D E

Term. Sanct. Hill.

Anno 9 W. III. 1697.

*Meggott, Assignee of Commissioners of Bankrupts of
Watson, versus Mills & Waine.*

IT was said by *Holt*, and not denied by the Court, that an Inn-keeper cannot be a Bankrupt, but a Victualler may; and if a Man contract Debt while he is a Dealer, and after leaves off his Trade, and then commits an Act of Bankruptcy, there none of his Creditors, becoming so since the Leaving off of his Trade, can sue out a Commission of Bankruptcy; but if those, who were his Creditors before his Leaving off his Trade, sue out such a Commission, the other Creditors may come in and join. In this Case there being some Disagreement about the Fact, it was ordered to be tried again.

Bankrupt.
1 Jon. 437.
A Commission
of Bankruptcy
may be taken
out against a
Person who
had left off
Trade, for a
Fact commit-
ted while in
Trade.

Jones versus Morley. 4 Jac. Rot. 76.

p. l. i. L. Raym. 287.

Ejectment of the Manor of *Fransham*; Special Verdict; *Anne Bowyer* was seised in Fee of the Lands in Question; and being so seised, by Indenture of Lease and Release dated the 22d and 23d of *July* 1664. reciting a Marriage intended to be had between *Edw. Morley* and herself; and in Consideration that *Edw. Morley* had agreed to settle on her, for a Jointure, so much of the Manor of *Barnham*, and other his Estate in *Sussex*, as should amount to the clear yearly Value of 300*l. per Annum*, at the Time of the Settlement, during her Life, grants *Fransham* to Sir *Will. Morley* and to *J. N.* in Fee, to the Use of herself in Fee, till Marriage

Salk. 677. S. C.
4 Mod. 261.
S. C.
Parl. Caf.
140. S. C.
Carth. 410.
Comb. 429.
Where Con-
veyance enures
by Way of
Transmuta-
tion of Posses-
sion, the Uses
may be declar-
ed without
Deed, else not.

riage and such Settlement made; then to the Use of *Edw. Morley* in Fee. Jury find, that the Marriage took Effect; and that after the Marriage another Indenture 29th of *Jan.* 17 *Car.* 2. was made between *Edward* and *Anne* his Wife of one Part, and *Jones* and *Trusler* on the other Part; reciting therein, that a Fine was already acknowledged, and agreed to be levied next *Hillary* Term, to be to the Use of *Edw. Morley* in Fee; and that two Days after, *viz.* the 31st of *January*, by another Indenture between *Edw. Morley* of one Part, and *Anne* his Wife on the other, they covenant to revoke, annul and make void all Contracts and Agreements between them, or any other for them, till the Marriage Covenant should be performed; Jury find a Fine was levied *Ostabis Purificationis* 17 & 18 *Car.* 2. 1665. that the 300*l.* *per Annum* was never settled, but that 250*l.* *per Annum* was; charged with a Rent of 15*l.* that the 250*l.* was in Part of her Jointure; that 9 *July* 18 *Car.* 2. *Edw. Morley* by Lease and Release did mortgage to *Doble* the Lands in *Fransham* in Fee for 630*l.* That 19 *Car.* 2. *Edw. Morley* died, and his Wife *Anne* surviving entered into the 250*l.* *per Annum*, and enjoyed it during her Life; that *Doble* assigned his Mortgage to one, in whose Right the Defendant claims, as also as Heir to *Edw. Morley*; that *Anne* died, and that Lessor of Plaintiff claimed as her Heir.

Holt delivered the Opinion of the Court, and said, the general Question in this Case was, whether the Fine levied *Ostabis Purificationis* 1695. were to the Use of the Husband and his Heirs, or of the Wife and her Heirs; and we are all of Opinion, that the Fine was not guided by the Deed of the 29th *Jan.* but controlled by the Writing between Husband and Wife of the 31 *January*. I shall premise three Things to be taken as granted.

1. If there be a Deed to levy a Fine to such and such Uses, at such a Time to such Persons; and in Pursuance thereof, a Fine is levied to the same Persons, and at the same Time, the Fine shall not be averr'd to be to other Uses by any parol Averment, or Writing, which is not a Deed; but by a subsequent Deed it may. But if the Fine varies in any Circumstances from the Deed, the Parties are at Liberty to aver, that the Fine was to other Uses different from the Deed; and so is 2 *Co.* my Lord *Cromwell's* Case; and 5 *Co.* Earl of *Rutland's* Case.

2. Tho' the Fine varies from the Deed, and is levied at another Time, or to other Persons, yet if nothing do appear

to the contrary, this Fine shall, by Construction of Law, enure to the Uses contain'd in the Deed.

3. If this Fine had been levied according to the Deed of 29 Jan. the Uses thereof could not have been controlled by the Writing of 31 Jan. for tho' the Deed of a Feme Covert could not be binding, yet being relative to a Fine it gives an Efficacy and Operation to the Deed, and is as conclusive as if she were a Feme Sole.

Having premised these Things, I say this Fine is not to the Use of the Deed of 29 Jan. but is controlled by the Writing of 31 January; and first, this Fine varies from the Fine agreed on to be levied by the Deed of 29 Jan. for that Fine was not to be levied the same *Hillary* Term as this was, but the next *Hillary* Term, which was *Hillary* Twelvemonth; and so this Fine was levied before the Time in the Deed; and thus varying from it, leaves Room for an Averment, that it was levied to other Uses. There is a Difference between a Fine varying from the precedent Deed, and a subsequent Deed declaring the Uses of a precedent Fine or Recovery, viz. that in the later, tho' all Strangers might, before the Statute of Frauds and Perjuries, have been let in to aver a parol Agreement, prior to a subsequent Deed; yet the Conusor, or Recoveror, or his Heirs at Law, cannot aver against a subsequent Deed, that the Fine or Recovery was to other Uses than those contain'd in the Deed, they being estopped by their Deed; but if the Deed be precedent, and the Fine and Recovery varies therefrom, no Parties are estopp'd. Now as this Fine varies from the Deed, and thereby lets in an Averment, so here is an express Declaration of a Use, by the Writing of the 31 Jan. that the Fine should be to other Uses; and it was reasonable she should be satisfied, that her Husband would make a reasonable Provision for her, and therefore might expect such a Declaration as this; and this new Agreement was sufficient to declare the Use of the Fine: There are several Ways in the Law for declaring of Uses, whether upon Transmutation of Possession, or without it. If an Use be declared to be on Transmutation of Possession, as in a Fine or Feoffment, there needs no Agreement whatsoever; it is sufficient for the Party on the Transmutation to declare, that the Use shall be to such Party, and of such an Estate; but if an Use arises without Transmutation of Possession, the Use then does not arise by Virtue of any Declaration or Appointment, but there must be some precedent Obligation to oblige the Party declaring the Use, which

T t

must

must be founded on some Consideration ; for an Use, having its Foundation generally on Grounds of Equity, could not be relieved in Chancery, without Transmutation of Possession, or an Agreement founded on a Consideration. And therefore if Bargain and Sale were made of a Man's Lands on the Payment of Money, the Use would have raised, without Deed, by Parol. But if the Use was in Consideration of Blood, then it could not arise by Parol Agreement, without a Deed ; because that Agreement was not an obliging Agreement, it wanted a Consideration ; and therefore to make it an obliging Agreement there was a Necessity of a Deed : But where there was a Transmutation of Possession, there needed no Deed, but only the bare Appointment of the Party. Now in this Case there was a Transmutation of Possession ; and this Writing of the Husband and Wife of the 31st of *January*, tho' it be no Deed, yet it sufficiently shews the Intention of the Wife, and so is a good original Declaration of the Uses of this Fine. So the next Thing to be consider'd is, whether the Writing of the 31st of *January* be sufficient to declare the Use of the Fine ; or if it be not sufficient, whether it will control the Deed of the 29th of *Jan.* 1. I hold it is a sufficient Writing to declare the Use of the Fine. Now it is not necessary, in declaring an Use, if there be a Transmutation of Possession, to use the very Word *Use*. Any Expression, whereby the Mind of the Party may be known that such a one shall have the Land, is sufficient. We all know the Nature of an Use, that it was a meer equitable Interest ; the Estate in Law was in one, and the Benefit and Advantage of the Estate in another : Uses are indeed strange Things in their Nature, and of new Invention in the Law. The Original of them was to avoid the Statute of Mortmain ; *Brent's Case*, 2 *Leo.* 14. for when those Statutes prohibited the conveying Estates to the Clergy, they found out this Way to have the Estate conveyed to Lay Persons, under secret Trusts, to their Use, which in those Days affected the Conscience of the People ; and till the Time of *H. 8.* Clergymen sat in Chancery ; who, having Power over Mens Consciences, enforced them to perform those Uses. Indeed for a Time Uses were kept secret, and did not much appear, till the Differences between the Houses of *York* and *Lancaster* ; wherein the whole Nation being engaged, both Parties finding those Uses convenient, and fit to preserve their Estates, agreed to support them : So that in *Edward IV.'s* Time we find more Mention of them than before ; and they being

being thus brought in by a general Consent, were afterwards lick'd into Form: So that at length, if a Man for Money aliened and granted his Land to one and his Heirs, by this an Use was raise'd by Construction, and it amounted to a Bargain and Sale; and so is *Fox's Case*, 8 Co. 94. a. Now in this Case, here is an Agreement between the Husband and Wife, which tho' void as to an Agreement, yet is good to declare an Use. As suppose a Man at this Day make a Bargain and Sale, and the Deed is not inrolled, or make a Charter of Feoffment, and there is no Livery; yet they will be sufficient to declare the Use of a Fine afterwards levied between the same Parties. But suppose this be not a sufficient Declaration of the Use of a Fine, yet it will be sufficient to control the Deed of 29th of *January*; for thereby it is expressly declared, that all Writings, Agreements and Assurances, and Deeds whatsoever, different from the Agreement in the Marriage, shall be revoked and annulled; so that taking it in this Sense, to control and hinder the Rising of a Use according to the Deed of 29 *Jan.* no Use can rise to the Husband; but the Estate being the Wife's, the Use must, by Operation of Law, be to the Wife and her Heirs; and if so, then the Lessor of Plaintiff hath a good Title. *Judicium pro Quer'*, and affirmed in the House of Lords.

Broadwaite versus Blackerby and Perkins.

MOVED by *Northey*, that the Defendants might not be obliged to plead, because one of them was an Attorney; and the Bill was filed against him in the Vacation, whereas it should be in Term-time, for you must declare against him as present in Court; to which the Court agreed; and Mr. *Ashton* and Sir *Sam. Ashtree* certified the Practice to be so, and that it was never used to file a Bill in Vacation; for to be a Bill of a subsequent Term, the Bill must be filed *sedente Curia*, the last Day of the Term; too late after the Court is up. *Holt C. J.* If filed in Vacation, it cannot be a Bill of the precedent Term, for that is past, and the other not come; and then *Holt* mentioned another Fault, that in this Case a Bill should not have been filed against him, but he should have been declared against as *in Custodia*; for when you proceed jointly against a privileged Person and one not privileged, you must declare against them all *in Custodia*, for in a joint Action the Privilege

Privilege.
Bill cannot be
filed against an
Attorney in
Vacation. If
join'd with
another he
loses his Pri-
vilege, and
both must be
declared a-
gainst in Cu-
stody.

vilege is lost; as in the *C. B.* if you have an Action there against an Attorney and another, you must take out an Original against both; and Sir *Sam. Ashtree* certified, that it was never done, nor could be done, to declare against one in Custody and the other present. So the Court gave them Leave to strike out what they would; so they did not add any Thing, and said, that if the Bill be irregularly filed it may be taken off of the File. *Et adjern*.

Anonymus.

Postea Paich.
12 W. 3. Sir
Cecil
and others of
the Town of
Nottingham.
Attachment in
Chancery on
an *Alias* and
Pluries is re-
turnable in
B. R. and is
an Action on
which Damages shall be recovered.

UPON a Motion for an Attachment for not returning a *Mandamus*; it was said *per Holt*, that an Attachment in Chancery on an *Alias* and *Pluries* is returnable in this Court; and is not meerly for the Contempt, but is really an Action, whereon the Plaintiff shall recover Damages for the Delay in not executing the Writ; and we have without Reason gone on in Imitation of Chancery: It is a Contempt not to return the first *Mandamus*; therefore let a Return be made within a Week.

Courtney versus Collet.

Ante p. 73.

TRespass for Breaking his Close, Treading down the Grass and laying Nets on the Soil, and for Carrying away of his Fish; *nec non de eo quod* the Defendant *vi & armis* did break down certain Wares, whereby the Water over-flowed the Piscary of the Plaintiff adjoining, *per quod* the Fish escaped out of the Piscary, and the Plaintiff and his Servants were hindered from fishing there; Verdict *pro Quer*. And moved in Arrest of Judgment, that here Trespas and Case were joined together, which could not be; because no Actions can be joined, either when they are different in their Nature; Or secondly, When they require different Answers; Or thirdly, If they require different Judgments, as Trespas and Case do: For in one Judgment is *Capiatur*, and in the other, *quod sit in Misericordia*. But it was urged on the other Side, that it was all Trespas, and that the *per quod* was only in Aggravation of Damages; and this Term the Court was of Opinion that it was all Trespas; and Judgment was *pro Quer*.

Hinton versus Hern.

Mountague moved in Behalf of the University of *Cambridge*, that they might be allowed their Privilege in Relation to Licensing of Taverns in *Cambridge*, upon producing their Charter; but 'twas denied, and said by *Holt*, when a Privilege is once ascertained, and appears upon a Record, then it shall afterwards be allowed upon Motion; but where it was never contested before, there it must be judicially determined; and so it was done in the Case of *Castle and Litchfield*, in the Exchequer. *Hard. 505.*

Salk. 450.
Franchises not
to be allowed
on Motion,
'till have been
pleaded, and
are upon Re-
cord.

Skin. 12.

King versus Sancky and Tipper.

THE Defendants being Quakers were committed to *Worcester Gaol*, for refusing to answer on their solemn Affirmation in a Cause of Substraction of Tithes, or other Ecclesiastical Duties; and it was moved they might be discharged, because in the late Act, for permitting Quakers solemn Affirmation, there is a Clause appointing a speedy Remedy against Quakers for Tithes, *viz.* by Complaint to a Justice of Peace, which takes away the Spiritual Jurisdiction; for where the Common or Statute Law gives Remedy *in foro seculari*, whether the Matter be Temporal or Spiritual, the Conusance of that Cause belongs to the King's Temporal Courts, unless the Jurisdiction of the Spiritual Court be saved or allowed by the same Statute. *1 Inst. 96. b. fo. 320.* But *per Holt*; the Remedy appointed by the Law for Tithes against Quakers seems only an additional Remedy: The Ecclesiastical and Temporal Courts have herein a concurrent Jurisdiction; as in the Case of a Pension payable out of a Parsonage by Prescription, notwithstanding the Opinion of my Lord *Coke* on the Statute of *Circumspectè agatis*, you may sue in the Spiritual Court for the same, tho' a Writ of Annuity lies also at Common Law. But where the Statute alters the Offence, and makes it of a higher Degree, there it takes away the Ecclesiastical Jurisdiction; as in Case of Poligamy, after a Man has been tried for the same; so in Case of a Bastard Child, where a Man has been adjudged the reputed Father of it, they cannot proceed for Slander on that Account. Then another Exception was taken, that they were committed for not paying Tithes,

Where Statute
gives a Re-
medy for what
was before
suable in the
Spiritual
Court, unless
the Statute
alters the Of-
fence or Pu-
nishment, the
Jurisdiction is
not taken a-
way.

or other Ecclesiastical Duties, in the Disjunctive, without shewing certainly for what the Suit was; for tho' the Words of the Statute be in the Disjunctive, yet in the Commitment it should be precisely shewn; and for this Exception, the Defendants were discharged.

King versus Williams & al.

Indictment for rescuing *Borlace* out of the Sheriff's Custody in the *Inner Temple*, which sets forth, that a *Latitat* issued forth against *Borlace Termino Sanctæ Terinitatis*, whereon he was arrested, and they rescued him; and the Indictment was quashed, because it does not appear that any legal *Latitat* issued out, there being no such Term as *Sanctæ Terinitatis*.

Brewster versus Kidgel.

Sal. 615, 198.
5 Mod. 368.
Carth. 438.
Taxes.
Covenant in
1649. that A.
his Heirs and
Assigns shall
be paid a Rent-
charge, free
from all
Taxes, ex-
tends to all
future Par-
liamentary
Taxes.

CASE, upon a Wager concerning a Rent-charge of 40*l.* *per Annum*, whereof the Plaintiff, as Son and Heir of *Ellen Brewster*, is seised in Fee by Virtue of a Grant to her and her Heirs, issuing out of a Manor, of which *Kidgel* is 'Tertenant; that the Defendant affirmed, it was lawful for him to deduct 4*s.* in the Pound for Parliamentary Taxes, which the Plaintiff denied, &c. And upon Issue joined, a special Verdict was found, that 26 Nov. 1649. *Robert Langford* was seised in Fee of the Manor of *B.* and in Consideration of 800*l.* paid by *Ellen Brewster*, he granted to her and her Heirs a Rent-charge in Fee of 40*l. per Annum*, with a Covenant in the Deed for further Assurance; and on the Back of the Deed this Indorsement was; *Memorand, It is the true Intent and Meaning of these Presents, that the Grantee and her Heirs shall for ever hereafter be paid the said Rent-charge, without any Deduction or Abatement of Taxes, Charge, or Payment out of, for or concerning the said Rent, or the said Manor or Lands charged herewith.* And afterwards in 1652. for further Assurance, granted and confirmed the Rent aforesaid to *E. Brewster*, and her Heirs, with a *nomine pænæ*; and *R. L.* covenants, that at the Sealing thereof he was seised in Fee, and that it was free from all Incumbrances, and that he had Power to charge the same; and that the said yearly Rent of 40*l. per Annum*, freed from all Taxes, shall be for ever hereafter duly paid

at the Time and Place for the Payment thereof, &c. And Question whether the Grantor of the Rent, and his Heirs, shall be obliged to pay the said Rent, without any Deduction for, or by Reason of any Tax imposed by Parliament futurely on the said Rent; and *Holt* delivered the Opinion of the Court, that Covenant doth oblige the Grantor and his Heirs without Deduction. The Case is of very great Consequence, and hath been a Question a long Time, whether such Covenants do extend to all future Parliamentary Taxes whatsoever; which I think would be very hard, and I can by no Means agree thereto in this large Sense; but as the Nature of this Case is, we are all of Opinion, that it extends to all those Sorts of Taxes that shall be given by future Acts of Parliament.

1. When Taxes are generally spoken of, if the Subject Matter will bear it, they shall be intended Parliamentary Taxes given to the Crown; there are divers other Things improperly called Taxes, as Rates for Church and Poor, Sewers, or any Imposition that lessens a Man's Property is called a Tax; so in the *Stat. De Tallagio non concedendo*: But when Taxes are generally spoken of, they are to be understood of the highest and most eminent Sort of Taxes, those in Aid of the Crown.

2. That which particularly affects this Case is, the Time when this Covenant was made, *anno* 1649. when Taxes of this Nature had been used for four or five Years before. This Way of Assessment began since the War 1642. and in all those Acts, or Ordinances, there is this very Clause that is now in these Acts, on which this Question arises. If this Covenant had been in the Year 1640. it would not have reached this Case, because there was no such Kind of Taxes in Being. There have been several Ways of Taxing; the antient Way was by Tenths and Fifteenths. 2dly, By Subsidies, properly so called, 3dly, By Assessments or Royal Aids, which are same; and lastly, by this Way of a Pound-Rate. The Tenth and Fifteenth is the most antient Way of Tax. *Spelman's Glossary, verbo Quindecima*; and the last Chapter of *Magna Charta*, 2 *Inst.* 76, 77. The Fifteenth was originally set upon every Man's Head, but since the 8 *Ed.* 3. that was alter'd; for then, by Commissions into every County in *England*, a Valuation was made of all Cities and Towns at that Time, and returned into the Exchequer; after which, when a Fifteenth was granted, every Town knew its Proportion, it appearing on the Roll of the Exchequer what they were to pay; and then each Town rated its

its own Inhabitants, to make up the 'Tax; which Tax was antiently levied on their Goods; and not on their Lands; this being a Tax on the Person, and not on the Land; as appears from the Case of the Abbot of *Glassenbury*, 11 H. 4. 35, 36. But this Levying on the Goods being found troublesome, they afterwards in most Places agreed to levy it *secundum ratam terrarum suarum*, by Valuation of every particular Acre. Now while this Tax continued, this Covenant could have had no Manner of Effect, because no Rent was chargeable with this Tax; for the Occupier and Possessor of the Land was to pay his Share according to the Valuation of the Land; and the Rent was not at all concerned, but the Occupier was to pay, tho' he held the Land at a rack'd Rent. After this the Subsidy-Tax came in; the first I find was 32 H. 8. which was thus: If a Man was taxed for Lands and Goods, he was not to pay a Tax for both; but for that only which was of the highest Value: So that this was no Tax on the Land or Goods, but only on the Man, by Reason of the Land or Goods: If he lived in one County, and had Lands in another, he was to be taxed in the County where he lived. Now as to this Sort of Tax, there could be no Occasion for such a Covenant as this; because, if the Grantee of a Rent was taxed to a Subsidy, the Rent was not taxed alone by it self, but in Conjunction with his other Land; this continued to the later End of King C. 1. There was a Subsidy 15 Ca. 2. but finding by Experience, they were not so beneficial as Assessments, they had Recourse to them again, calling them Royal Aids. But ever since the Beginning of these Assessments, there was always a Clause, that the Tenant of the Land might deduct the Tax out of the Rent; and therefore it is plain the Design of the Parties here was to make Provision against any such Deduction for the future. This Way of taxing being then become frequent, tho' they were imposed by an usurp'd Authority, yet those being the Powers at that Time, and People forced to pay, and therefore they endeavour'd to secure themselves against them by Contracts. There was such a Tax in Being as the Ordinances of *Sept. 1649.* when this Covenant was made.

3. Tho' in Truth Taxes cannot be granted but by Parliament, yet they are not of a foreign Nature, but are known in the Law: And have always a virtual tho' not an actual Existence; for they are absolutely necessary on emergent Occasions; so that by the Constitution of the Government, in such Cases the Crown is to be supplied by those extraordinary Aids; which is the Reason that the King may

grant an Exemption from all future Parliamentary Taxes: 19 H. 6. 62. 1 Ed. 3. Stat. 2. c. 6. Dy. 52. and therefore this Covenant doth not provide against an unusual Accident, but against a Thing well known in our Law, as a Part of our Constitution.

The next Reason why this Covenant should extend to future Taxes, is, because it is granted to *E. Brewster* and her Heirs; which would be of no Effect, if not so understood. It appears indeed by the Provision made in the late Acts, that it was thought that these Covenants would have been repeal'd, except there had been a Saving, because it enacts, that the Tenant should deduct. This Provision was indeed cautious and wise, for preventing Disputes, but not absolutely necessary. 1st, Because these Taxes newly imposed are the Subject Matter for the Covenant to work upon. 2. This Act can by no Means destroy this Covenant; because tho' the Tenant hath a Liberty to deduct, yet the Act does not hinder him from paying his Rent without it; he doth not break the Law, if he pay his Rent without any Deduction; and this is the Difference when an Act of Parliament shall or shall not destroy a Covenant: If a Man covenants to do a Thing, which is lawful at the Time of the Making, and an Act comes afterwards, and makes the Thing covenanted to be done unlawful, such an Act is a Repeal of the Covenant; but where a Man obliges himself to do a Thing, which perhaps was not lawful before, and an Act makes it lawful, that Act does not repeal the Covenant. Dy. f. 27. A Lease for Years was made to a Clergyman before 21 H. 8. who covenanted not to alien without Licence; after which 21 H. 8. was made, which prohibited any Clergyman to hold any Land in Farm; whereupon the Clergyman assigned without License, and the Covenant held not to be broken; because 21 H. 8. made it unlawful for him to hold it. Dy. 48. pl. 5. Tenant in Tail was bound in a Recognizance not to alien, after which 32 H. 8. enabled Tenant in Tail to make Leases for twenty-one Years, or three Lives; he made a Lease for three Lives, and his Recognizance held to be forfeited notwithstanding the Statute; because the Act giving him only an Ability to do it, the Condition was not thereby dispensed with: So in this Case, it does not oblige the Tenant to deduct, it only makes it lawful for him so to do. 3^{dly}, This Act was made in this Manner only for the better Collecting and Answering this Tax to the Crown. Now when an Act is made to a particular Purpose, it shall not have any colla-

teral Effect to any Purpose whatsoever. 19 H. 6. 62. H. 4. granted to the Rector of *Eddington* an Exemption from all future Parliamentary Taxes to the Crown, and a subsequent Tax was after given to the King, without any Saving therein of such Charters of Exemption, and held that subsequent Act does not destroy the Grant.

But there are two Objections to be answered; 1st, That general Words shall not be construed to extend to any Act to be provided for by subsequent Act of Parliament; according to the Archbishop of *Canterbury's* Case, 2 Co. To which I answer, that the Rule taken in that Case hath several Exceptions. 2^{dly}, Where such general Covenant may secure against such Incumbrances, as may be imposed without Act of Parliament, that it may be hard to extend it to Parliamentary Charges. But in this Case the Covenant could extend to no other Charges, because the Tenant had no Power, by any Law then in Being, to pay any Tax for the Grantee out of the Rent due to him.

2. *Obj.* That tho' this Covenant should be good as to the Monthly Assessments, yet not to this Pound-Rate, which was not in Being when this Covenant was made.

Resp. These two Sort of Taxes differ only in Form; the Nature of the Tax is the same, the same Things are taxed, and the same Clauses of Deduction in both. To conclude this Matter, this was a Tax in Being at the Time of making this Covenant, which shews plainly that the Meaning of the Parties was to provide against it. If indeed an Act of Parliament had given so much Money towards the Building of *Paul's*, that would not have been within this Covenant; for it extends to Taxes to the Crown only, which are usual Taxes, and then given when this Covenant was made.

There is another Matter in which I have not consulted my Brothers, and that is, whether the Tertenant in this Case be obliged by the Covenant; this is a Covenant by the Grantor of the Rent, who was seised in Fee of the Manor. Now who this Tertenant is does not appear, whether he be Heir or Assignee; for if he be Assignee, I do not think him chargeable in Law; for this Covenant doth not run with the Land. *Hard.* 87. I make no Doubt, but that the Assignee of the Rent shall have Covenant against the Grantor; because it is a Covenant annexed to the Thing granted; but, that Covenant should run with the Rent against Assignee of the Land, I see no Reason. If this Rent was granted so to be paid, it would be another Matter; but

here is only a Covenant, and no Words amounting to a Grant; and therefore there can be no Relief in this Case against the 'Tertenant, but in Equity; and therefore for this Point I do not see how the Plaintiff can have his Judgment; for if this Covenant should charge the Land, it would be higher than a *Warrantia Chartæ*, which only affects the Land from the Judgment therein given. But the other three Judges thought that this Covenant might charge the Land, being in Nature of a Grant, or at least a Declaration going along with the Grant, shewing in what Manner the Thing granted should be taken, and reckoned the Indorsement as *Part of the Deed*; and so Judgment was given for the Plaintiff.

A. seised of a Rectory of 120*l.* per Annum, charged with a Fee-Farm Rent of 26*l.* per Annum, was taxed for all the Rectory only according to the Rate of 25*l.* per Annum for Taxes; he retains 4*s.* per Pound for the Fee-Farm Rent, which was much more than he really paid; the whole Matter appearing in the Exchequer, where a Bill was brought, it was decreed, that the Owner of the Fee-Farm Rent should allow only in Proportion to what was paid. This in the Case of one *Sherington*.

Pickering seised of Land, and Sir *J. Werden* of a Fee-Farm issuing out of it, paid Taxes only after the Rate of 1*s.* 3*d.* per Pound, and retained for the Fee-Farm after the Rate of 4*s.* at which the Land-Tax was; on which Sir *John Werden*, Owner of the Fee-Farm Rent, brought his Bill in the Exchequer, and prayed that *Pickering* should set forth the Value of the Land, and what Rent he received, and what he had paid for Taxes; to which Bill *Pickering* demurred, and the Demurrer allowed, notwithstanding the above Case of *Sherington* was cited; the whole Matter there appearing, and this being on a Demurrer, which was made the Difference.

Burdeaux versus *Dr. Lancaster, Vicar of St. Martin's*, and *Richard Gresdale Parish Clerk there*.

DR. *Lancaster* and *Gresdale* sued *Burdeaux* in the Consistory Court of the Bishop of *London*, alledging therein, that *Dr. L.* was Vicar, and *R. G.* Clerk of *St. Martin's*, and that *ratione præm'*, ac etiam of an immemorial Custom, the

¹ Salk. 332

Et 334.

No Fees due

for Christning

or Burial, un-

less by Cu-

tom.

the Vicar was intitled to 2s. 6d. for every Child born and baptized within the Parish; and 12d. for the Churching every Woman; and the Clerk was intitled to 12d. for the Registering every Child; and that *Burdeaux* was an Inhabitant within the Parish, and had a Daughter born therein, and had not paid. *Burdeaux* denied the Custom in the Spiritual Court, and moved here for a Prohibition; suggesting, that a Clerk is a Lay Officer, and his Fees Lay, for which he can only sue in the Temporal Court. That of common Right no Fees are due for Sacraments; that there was no such Custom as was alledged, and that all Customs are triable by the Common Law; and that this Child was not baptized, nor his Wife church'd by the Vicar; nor his Child register'd by the Clerk: And now was urged against this Prohibition, that these were Fees used for Ecclesiastical Matters, and therefore might be sued for in the Spiritual Court; and the rather, because they were small inconsiderable Matters, just like private Seamen's Wages; and that the Doctor and Clerk did not sue for them as due by Custom, but of Right by Canon Law. *Holt*: Nothing can be due for these Matters by common Right; and as for the Canon Law, it is of no Authority of it self in *England*, but only so much as has been through Custom received here. The Convocation cannot by their Canons take Money out of People's Pockets. *Linwood* says, if a Parson takes any Thing for Christening, it is Simony; but indeed, says he, something may be by Custom; but then this Custom can never be good, to take Money for Christening a Child which never was christned by them. This is like the Case in *Hob. 175.* where a Man died in one Parish, and was buried in another, and a Fee was demanded for his Burial in the Parish where he died. If you say you ought to christen their Children, you ought to libel against them for not Christening their Children, according to the Canon Law, but you can never have Money for Christening when you do not. Therefore let a Prohibition go; and if you think fit, they shall declare, and you may do thereon as you please.

Trantor versus Duggan.

Ante p. 138.
Cumb. 468.

D*uggan* claimed an Estate within the Grand Sessions of *Wales*, under a Deed of Settlement, which Deed he pretended *Trantor* had got, and preferred a Bill in Equity for the Discovery thereof, in the Equity-Side of the Grand Sessions,

Sessions, against *Trantor* who lived in *London*, and served him with a *Subpœna* thereon; and *Trantor* moved for a Prohibition, suggesting, that no Man ought to be troubled by Virtue of any Process there, except he lives within the Jurisdiction of the Court; and that he lived in *London*, and was served with a *Subpœna* there; and a Prohibition was granted *per Cur'*, saying, they would not prohibit their Proceedings in this Court of Equity, but only their Proceeding on any Process against any living out of their Jurisdiction; for else, if he did not appear there, they would sequester the Estate he had within their Jurisdiction. Then it was moved, that *Trantor* might have pleaded this below to the Jurisdiction of the Court: But the Court said, if he had lived within the Locality of their Jurisdiction, tho' in a Franchise, or Place exempt, it might have been another Matter; but where a Man lives out of the Limits of their Jurisdiction, it is no Reason to force him to appear there to defend himself. Wherefore, &c. *Ante* 138.

Thomson versus Leach.

Ejectment on a Special Verdict; the Case was: *S. Leach* Tenant for Life, with contingent Remainders in Tail; Remainder over to Sir *Simon Leach* in Tail; Remainder in Fee to *N. Leach*; Tenant for Life, before the Contingency happens, surrenders to Sir *Simon Leach*, but at the Time of the Surrender was *Non compos mentis*; and the Question was, whether this Surrender by a *Non compos* was void; and if not void, but only voidable, whether there be such a Right still remaining in the *Non compos*, as is sufficient to support the contingent Remainder. And *per Cur'*, the Surrender is void; for whatsoever is done by an Infant, or *Non compos mentis*, which takes Effect only by Deed, is void; but it is otherwise in Case of a Feoffment, by Reason of the Notoriety and Solemnity thereof; and *per Holt*, if *Non compos* make a Feoffment by Letter of Attorney, he is as much disabled to avoid that Feoffment himself, as if he had made Livery in Person; and yet it is a void Feoffment to all other Persons. The true Reason why a Feoffment by an Infant, or *Non compos*, is but voidable, is because of the Notoriety and Solemnity of the Feoffment and *Livery*, that antient Way of Conveying, which is in View of the whole Country, who saw the Transmutation of Possession; and therefore it was preferred before all secret Ways; and therefore if Tenant in Tail makes a

Salk. 427.
Carth. 435.
Surrender by
Lunatick is
absolutely
void.

8 Co. 45.

8 Co. 42. b.

Y y

Feoff-

Vide 3 Co.
The Case of
Fines 10.
Co. Seymour's
Case.

Salk. 675.
5 Coke 119.
10 Coke 43.

Feoffment, it devests the Remainder, and turns all to a Right. But if Tenant in Tail make a Bargain and Sale, or a Lease and Release in Fee, he makes no Devesting thereby, but only passes an Estate for his Life; *Loyd and Gregory's Case*, 1 Cr. 502. is express, that the Surrender of an Infant is void. If an Infant grant a Rent-charge, and the Grantee distrains, the Infant may have Trespass, which shews the Grant to be void; and where it is said in the Books, *Whelpdale's Case*, that the Grant of an Infant is not void, but only voidable, the Meaning thereof is, that he cannot plead *Non est factum*, and give Infancy in Evidence, because it hath all the Formalities of a Deed, as Writing, Sealing and Delivery; but he shall shew the special Matter, whereby it may appear, that as to the Operation of the Deed, or Efficacy of it, it is void. Infant and *Non compos* are parallel in all Cases, but only as to the *Non compos's* Disabling himself; but the Heir may enter on the Alienee of the Idiot, without *Sci' fac'*, but not during the Life of an Idiot or *Non compos*; there has been another Question started worthy of Consideration, viz. Supposing the *Non compos* had made a Feoffment in Fee, yet whether is not a Right remaining in him sufficient to support a contingent Remainder, tho' a Right of Action will not; for the Reason why he cannot avoid his Feoffment, is not for Want of Right, but because of his personal Disability: And if Tenant for Life make a Feoffment during his Lunacy, the King, upon Office found that he is a Lunatick, may avoid the Feoffment by *Sci' fac'*, and so revest the Inheritance; and if so, why may he not also prefer a contingent Remainder; a Right of Entry will, tho' a Right of Action will not support a contingent Remainder; as if there be Tenant for Life, with a contingent Remainder over, and Tenant for Life be disseised, the whole Estate is devested, but the Right of Entry in the Tenant for Life shall support the contingent Remainder; but if Tenant for Life be disseised, and a contingent Remainder, expectant upon his Estate, does not vest before a Descent is cast, then it is gone because it is turn'd into a Right of Action; tho' now it may be preserved longer by the Statute of H. 8. whereby, except a Disseisor be five Years in Possession, a Descent will not take away his Entry. The Case of *Bigot and Smith*, 1 Cr. 102. is a remarkable Case; which was, Baron and Feme Jointenants for Life, Remainder to the Heirs of the Survivor of them; the Husband alone made Feoffment in Fee, and died, the Wife survived; and the Question was, whether

whether this contingent Remainder could arise out of the Wife's Estate; and held that it should not; because, that during the Coverture, she had no Right of Entry or Action, but the Husband had the Power of the whole Estate; and tho' her Estate and the Contingency happened and started up together *eo instante*, yet this was not sufficient, because the particular Estate, that should support the Contingency, ought to be precedent. But there is no Necessity to hesitate in this Point, because on the first Point it is plain, that Judgment ought to be for the Plaintiff.

Britton and Cole.

TRESPASS for taking forty-three Sheep and two Lambs, 5 Mod. 112.
 20th of May 7 W. Defendant justifies, that the 12th Salk. 395.
 of Feb' 6 W. before the Trespass alledged, the King's Writ Carth. 441.
 of *Levari facias* issued out of the Exchequer to the Sheriff Skin. 617.
 of *Gloucester*; reciting, that the late Sheriff of *Gloucester*, Comb. 434,
 by Virtue of a *Capias utlagatum* issuing out of the Common 469.
 Pleas against *Francis Cresset*, that was outlawed in *Somersetshire* 12 Jun. 5 W. & M. *ad Sectam Tho. Cole modo Defendantis*, and *Mary* his Wife, in a Plea of Debt, had return'd, that the said *F. Cresset* was then seised in Fee of the Lands in Question; and that he seised the Lands into the King's Hands, which were found to be of the annual Value of 55 *l.* and therefore the King commands the Sheriff that all and singular the Rents, Issues and Profits of the Premises arising thereon, from the Taking the same into the King's Hands, to the Feast of the Annunciation then next ensuing, should be levied according to the annual Value thereof; so that the Money thereof arising should be had before the Barons of the Exchequer at such a Time; by Virtue of which Writ the Sheriff made a Precept directed to all his Bailiffs, and particularly to *Anth. Powell, J. O.* and *J. Powell*, to levy the Money aforesaid, according to the Tenor of the said Writ, out of the Issues of the said Land; and because the said forty-three Sheep and two Lambs were after the said Inquisition, and before the Feast of the Annunciation, Levant and Couchant upon Part of the Premises; the Defendant requested the said *A. Powell* and *J. Powell*, to take and drive away the said Sheep and Lambs, according to the Tenor of the said Writ; *super quo idem Josephus P. & J. Powell* took and drove away the said Sheep and Lambs; on which Plea the Plaintiff demurr'd, and the Defendant

The Cattle of a Stranger, Levant and Couchant on Land extended on an Outlawry, may be taken by *Lev' facias*, for they are the Issues.

Defendant joined in Demurrer. And *Holt* delivered the Opinion of the Court.

The Case in short is: *Cresset* is outlawed in a personal Action; and on a special *Capias utlagat'*, and Inquisition thereon, such Lands are found to be his, and return'd to be of the annual Value of 55 *l.* the Plaintiff's Cattle are found upon the same Land Levant and Couchant, they are taken by Virtue of a *Levari facias*; and the Question is, whether this Taking be justifiable; and we are of Opinion it is. *1st*, Because there is a direct Command to the Sheriff to levy this Duty, according to the annual Value, out of the Issues of the Land; and Cattle Levant and Couchant on the Land are Issues. Statute of *W. 2. c. 39.* says, that *omnia bona mobilia* on the Land are Issues; and *omnia mobilia* comprehend Cattle. *2 Inst. 453.*

21 H. 7. 7.

Postea Mich.
12 W. 3.
Dubois and
Trant.

Hard. 101.
Ray. 17.

2dly, The Land is Debtor to the King, which makes the Cattle liable; and if the King had not this Remedy, his Pernancy of the Profits would signify nothing, for it would be in the Power of the Party outlawed to defeat the King; he will let out the Ground, or take in Cattle on Contract to feed, and so run away with the whole Profits, and there is no Remedy for the King to get the Money on the Agreement. Now if the Person outlawed, during his Outlawry, make a Feoffment in Fee, shall not the Cattle of the Feoffee be Issues of the Land? without Question they shall; for the Feoffee shall take the Land in the same Plight as the outlaw'd Person had it, and the Feoffment shall not determine the King's Right: Notwithstanding the Book of 21 H. 7. which says, the King's Interest shall be determined by the Alienation of the outlaw'd Person; which Book is to be understood with this Difference; If a Man be outlawed, and before Inquisition taken he aliens his Estate, and then Inquisition is taken, the Alienation of the real Estate, before Inquisition taken, prevents the King from having the Pernancy of the Profits; but if he make Alienation after the Inquisition taken, there the King's Pernancy of Profits continues; and this is the constant Course of the Exchequer; so is *Hard. 101.* Attorney General *versus Freeman*; and *Winsor and Savill, Ray. 17.* The Reason of which Difference is, that until the Inquisition be found, the King has nothing; for the Inquisition that is taken on a special *Capias utlagatum* is an Office that intitles the King; so that if the Alienation be before Office found, then it is before the King has a Title; but after a Title is once vested in the King, that shall not be devested by any Act of the Party. Issues and Profits cannot

not mean the Goods of a Person outlawed, for he cannot have Goods; if after Outlawry he purchases them, they are the King's without Office; but as to the real Estate, or a Chattel real, the King cannot be intitled without Office, but for Chattels personal he may. Since Issues may be levied on Feoffee or Alienee, that comes in after Inquisition, why not in this Case; nay, perhaps the Plaintiff here may be Alienee, it is not necessary the King's Officer should take Notice of his Title, he ought to make it appear. Suppose this Plaintiff had a Right to the Land precedent to the Outlawry; as for Instance, a Lease for Years from *Cressett*, yet if this be not found by the Inquisition, or afterwards allowed in the Exchequer, he cannot have an Action of Trespass; for if it be not found, he must go into the Exchequer by Way of *Monstrans de droit*, and plead it there; for he shall not falsify the King's Title in an Action: It may be the Plaintiff had a Title, but then he ought to have shewn that he had pleaded it in the Exchequer, and had it allowed there. Now if the Feoffee's Cattle be forfeitable, why not the Cattle of one who contracts with the outlawed Person; and much more the Cattle of a Stranger, or meer Trespasser; for a Wrong-Doer shall not have more Advantage, than he that has Right; *Stafford and Bateman's Case*, 3 Cr. 431. has been quoted; where it was held, that on a *Fi' fac'* for the King's Debt no Goods could be sold but the Debtor's; but that Case is quite different from this, for that was a *Fi' fac' De bonis & catallis* of the Debtor, on which the Sheriff had no Authority to take a Stranger's Goods; but this is a *Levari facias de exitibus terræ*; to explain which it is to be considered, there are several Executions for the King: 1. A *Capias* to take the Body only. 2. A *Fi' fac'*. 3. An *Extendi fa'*, which is called the long Writ; and 4. this *Levari facias de exitibus terræ*; by none of the three first could the Plaintiff's Cattle be taken.

Now as to Issues, when they are forfeited, the whole Inheritance is charged with them. If Tenant for Life be return'd of a Jury, and make Default, whereby he forfeits Issues, and dies, the Arrear of the Issues shall be levied on the Remainder. The Land is Debtor, and becometh Debtor for Default of Tenant for Life only; for which this Reason is given, that it is a publick Service charged on the Fee-simple, and therefore the Land must be charged with the Issue, by whomsoever Default was. Now indeed, how this be in Case of an Outlawry, I doubt; for if Tenant for Life be outlawed, and he is found to be but Tenant for Life

by Inquisition, and there is an Arrear of Issues, I do not know whether it can be levied on the Reversion; because it arises from the Tenant for Life's own particular Neglect and Default. But however, it makes no Alteration to those that claim under Tenant for Life; in Sir *Henry Clare's* Case in *Lane*.

2 Rol. Ab.
457.

Two Tenants in Common, one was indebted to the King, and on Process the Beasts of the other were taken; and it was held they could not; because the one Tenant in Common may put his Beasts on all the Lands; and so is 2 Rol. Ab. 457. but says the Book, it will be otherwise for Cattle that come in by Wrong on the Land of the King's Debtor, and are there Levant and Couchant. It is said in 2 Rol. Ab. 159. that the King may distrain the Beasts of a Stranger Levant and Couchant on a *Levari fac'*, but he cannot sell them; which must be a Mistake in the Printer, or in those who had the Management of *Roll's* Manuscript; for the End of a *Levari fac'* is to have a Sale; and therefore to allow they may be taken on a *Levari facias*, and not sold, is a Contradiction. No *Levari facias* issues but as to Lands, and where the Land is Debtor, the Cattle of a Stranger, that are Levant and Couchant, are as liable as the Cattle of the Owner; and so it is in the Case of a Rent-Service. Nay, if one seised in Fee grant a Rent-charge, tho' this be a Charge on the Land by his own Act; yet if his Neighbour's Cattle escape thereinto, and happen to be there Levant and Couchant, they are distrainable, because the Land is Debtor. This Case was adjudged in Point in the Exchequer, *Pasch. 18 Car. 2. Hodgson and Toobigle*, which was Trespass, as this is; and *Hale Ch.B.* said, that by Virtue of a *Levari fac' de exitibus terre* of a Person outlawed, the Cattle of a Stranger may be taken, and so is the constant Practice of the Exchequer; whereupon the Party seeing the Opinion of the Court, relinquished his Suit, so that no Judgment is entered; and so there is another Case in Point in the Exchequer, *Wrightson and Rayner, Mich. 22 Ca. 2. Rot. 14*. So that we think the Defendant's Plea good in Substance, and that the Cattle were liable to be taken and sold by Virtue of the *Levari fac'*. There have been several Exceptions taken to the Pleading; 1st, That the Defendant, not being an Officer, ought to have pleaded the Record of the Outlawry; which seems to be a good Exception, but something complicated, which I will explain: If there be no Judgment, and a *Ca' Sa'* or other Execution is taken out, the Sheriff, and all other Persons acting under him

him in the Execution, are justifiable, tho' there be no Judgment. But if a Stranger of his own Head interposes, who is not concern'd, and he sets on the Sheriff to do Execution, he cannot justify this; or suppose it be the Plaintiff who sued out the Writ, he must in his Justification plead the Judgment; for if there be no Judgment he is a Trespasser. *Ray. 73. Turner and Felgate.* Now if the Defendant had *Raym. 73.* justified he did it by Command, or in Aid of the Officer, then he had been in the same Case with the Officer himself; but if he will come in without any Authority, tho' he be a Party concern'd in the Suit, yet he ought to shew some Foundation; so in Outlawry, as well as in the other Case, he ought to shew there was some Judgment to warrant the *Ca' Sa' or Fi' fa'.* In Trespass, Defendant justified Distraining the Cattle Damage-feasant as Bailiff to *A.* in which Case, tho' the Cattle were Damage-feasant, yet if *A.* did not command the Defendant, he was a Trespasser; and in this Case the Command was traversable. *2 Leo. 196. 1 Rol. Rep. 46.* So in Replevin, Defendant makes Conufance as Bailiff to *A.* that he took the Cattle Damage-feasant by the Command of *A.* the Command is traversable, because Damages are only concerned, *2 Leo. 215. Fuller and Trimwell.* But in Replevin of Distress for Rent, the Command is not traversable, because it is to try a Right. *1 Leo. 50. Buller's Case.* By all which it appears, that tho' the King's Writ shall justify an Officer, yet it shall not others, except they justify under an Officer; or there be a Judgment to warrant the Writ, which must be shewn by him in his Justification; and therefore he should have shewn the Outlawry to be in Being, *prout patet per Record' in C. B.* for which Omission the Plea is ill. Another Exception that has been taken to the Plea is, that it is not said, that the Writ was delivered to the Sheriff, or the Warrant to the Bailiff: Now this is no good Exception; for tho' the Course be to say so, yet this is a Plea in Bar, wherein Certainty to a common Intent is sufficient; and if they took any of the Goods before the Writ came to the Sheriff, or the Warrant to the Bailiff, it must be shewn in the Replication. *1 Saund. 298. Green and Jones.* 3. Exception to the Plea was, that the Defendant did request *Anthony and Joseph* to do Execution, and that *John and Joseph* did it, which is not pursuant to the Request; and tho' according to *Lasbrook's Case, Hutton 127.* Execution may be done by one, tho' the Warrant be to four; yet here, as the Defendant has pleaded, the Taking by *John* is as much a Trespass as the Taking by *Joseph*; so that as
to

to the Merits of the Cause, we are all of Opinion *pro Def.* but for the Insufficiency in Pleading, Judgment must be *pro Quer.*

King versus Hewson.

Salk. 175.
Constable to
be chosen in
the Leet or
Sheriff's Torn.

AT the General Quarter-Sessions at *Leicester*, an Order was made, That whereas the Vill of *Charley* had no Constable, and no Court-Leet being kept there, the Court did order that *Thomas Hewson*, Inhabitant of *Charley* afore-said, should be sworn to execute the Office of Constable for the Year ensuing there, or until another be sworn in his Place; and that on the Death or Removal of the said *Thomas Hewson*, from the said Office, that some one or other of the Inhabitants should take upon them the said Office, *toties quoties* there should be any Vacancy; and after at the same Sessions another Order was made, reciting the Appointment of the said *Thomas Hewson*, and that he, being present in Court, was divers Times requested to take upon him the said Office, yet he peremptorily refused the same, in Contempt of the Court; for which he was committed to the County Gaol, till he should take upon him the said Office, or otherwise be legally discharged; which Orders being removed by *Certiorari*, it was moved to quash them, because the Justices of Peace have no Power; for the Election of Constables belongs originally to the Leet and Turns; and the 13 & 14 Ca. 2. c. 12. §. 15. gives Power to Justices of Peace only in Case of Death, or Removal of the Constable out of the Parish, or Continuance of a Constable beyond a Year, and this only in Default of the Leet; which is not this Case, for they appoint a Constable where was never one before; then they could not have imprisoned him for Refusal, but he should have been indicted; *quod Cur' concessit*. And as to the first Matter, *per Holt*, every Vill must have a Constable, otherwise it is but a Hamlet, they are commensurate one with another; and tho' a Constable be properly of a certain Division; yet if a Warrant be directed to him by Name, to execute it out of his Division, he may do it; but if it be generally, to all Constables, Headboroughs, then it must be taken respectively, and they can then act only in their Division. If there be no Leet at all, then you must go to the Sheriff's Torn. The Leet is but a Franchise derived out of it; and any Matters done at the Sheriff's Torn, which is within the Leet's Jurisdiction, is not void, and

and *coram non judice*, but only an Infringement of the Franchise. How can Justices of Peace make a Constable, who is an Officer at Common Law, and they only by Statute; only there may have been such an Usage, from the Neglect of those to whom it properly belong'd; perhaps there may be some old Statute for it, which is lost. Antient Usage for three or four Hundred Years is good Evidence of a Law. If an Act of Parliament be lost or imbezil'd, the Law remains still. May be the Conservators of the Peace did it at Common Law. That his Opinion was, that the Justices of Peace could not create a Constable, where there was none before; tho' he had heard it said in my Lord C. J. Keiling's Time, that if a Town be newly built, and they want a Constable, that the Justices of Peace may; and it being in this Case contested, whether there was a Constable before, it was ordered to be tried.

If an Officer plead his Privilege by Writ, you cannot deny his being an Officer.

Lamb versus Fenison.

ERROR to reverse a Judgment in *Durham*, in Ejectment before *Justices Itinerant*; the Error assigned was, that a *Tales de Circumstantibus* was awarded, which ought not to have been; for 5 *El. c. 25.* which gives the *Tales de Circumstantibus* in *Wales*, and the Counties Palatine, gives it only before the Justices of the Great Sessions, and not before Justices in *Eyre*, as these are. But the Court held this to be no Error, because the Stile of the Justices in *Durham* is always *Justices Itinerant*; and there is no Great Sessions at all in the County Palatine; and therefore this Act must be understood of such Courts therein as answer to the Grand Sessions in *Wales*.

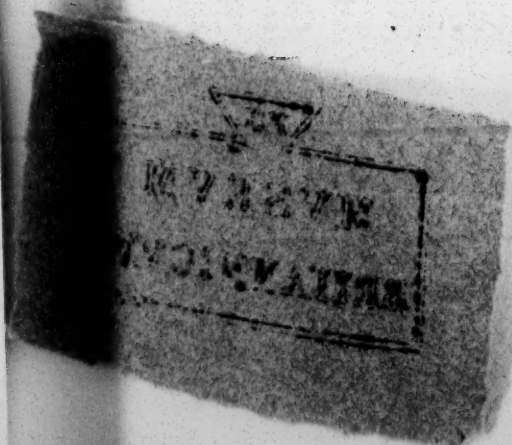
Durham:
The Stile of
Justices in
Durham is al-
ways *Itine-*
rant.

Then it was urged, that *Per Cur'* was omitted in the Judgment; but it was answered and resolved, that *ideo consideratum est*, without saying *per Cur'*, was good in the County Palatine Courts, which are look'd upon in that Respect as the Courts of *Westminster*; and so Judgment was affirm'd.

1 Saund. 74,
75.

A a a

Berty



Berty versus Lord Faulkland, in Chancery.

Salk. 231.

S. C.

2 Vern. 333.

2 Chan. Caf.

129.

Devise to *A.*
in Case, that
within three
Years after his
Death, she
should marry

Lord *Guil-**ford*; and

then if not,

devise over:

Proposals be-

ing made to

Lord *Guil-**ford* and refus-

ed, she mar-

ries another

Person. De-

creed this

was a Condi-

tion precedent

to the Vesting

the Estate,

which not be-

ing complied

with, the E-

state to go o-

ver.

2. Whether

not determin'd

otherwise in

the House of

Lords.

THE Case was: *John Cary* the Testator, being seised in Fee of Lands in Question, by his Will the 10th of Sept. 1685. devised them to divers Trustees therein mentioned, and their Heirs, under several Trusts therein mentioned, viz. to the Trustees, for the first three Years after his Decease, to take the Profits and imploy them to the several Uses appointed by him; and after the Trustees to stand seised in Trust for his Niece *Honor Willoughby*, (now Wife to the Plaintiff) for her Life, in case she shall, within three Years next following after his Decease, be lawfully married to *Francis Lord Guilford*; and in Case the Marriage shall take Effect, then the Remainder to the Issue Male begotten on her Body by the said Lord *Guilford*; but if there be no such Issue, or in Case the Marriage shall not take Effect, and be solemnized within three Years, then the Trust is devised to *Anthony Lord Faulkland*, for his Life; Remainder to his first Son in Tail, &c. and for Want of such Issue, to *Edward Cary* for Life; Remainder to the first Son in Tail, &c. who is the present Lord *Faulkland*, and now Defendant. The 20th of the same Month the Testator made a Codicil, reciting therein his Devise to his Niece *Willoughby*, and thereby declared that it was his Will, that if the said Marriage did take Effect before the Age of Consent of them, or either of them, that unless the said Marriage should be confirm'd by both the Parties at the Age of Consent, the said Neice should have no Benefit by the said Trusts limited, but they should cease unto her. *J. Cary* the Testator died; after which there were some Transactions between the Trustees of the Lord *Guilford* and Mrs. *Willoughby* concerning the said Marriage; but there were some Misunderstandings between them; and by an Order of Lord Chancellor *Jefferies*, on a Petition to him, it was ordered that the young Lady should not be married to my Lord *Guilford*, unless he would consent to the Proposals made by Mrs. *Willoughby's* Trustees; the three Years expired, and Mrs. *Willoughby* never married to my Lord *Guilford*; but Anno 1691. married Mr. *Berty*. *Anthony Lord Faulkland* died without Issue; *Edward Cary* died; and Mr. *Berty* and his Wife exhibit their Bill against the Trustees of *J. Cary*, and the first Son of *Ed. Cary*, the present Lord *Faulkland*, to have an Account of the Profits of

J. Cary's

7. *Cary's* Estate, and to have a Conveyance executed to them according to the Trusts in the Will; upon which the Question is, whether, seeing there was no Marriage had within three Years, and there was no Fault in the young Lady, she should be relieved in Equity, and have this Estate decreed to her for Life; Remainder over to the Heirs of her Body by Mr. *Berty* begotten; and it was adjudged by the Lord Chancellor *Somers*, assisted by the Lord C. J. *Holt* and *Treby*, that the Plaintiff could have no Relief.

Holt: All Letters and Discourses of the Testator of his Kindness to his Niece ought to be totally rejected; because both before the Statute of Frauds and Perjuries, and especially since, we ought to confine ourselves to the Words of a Will, and not to have Recourse to any Thing extrinsical or *dehors*, for to explain a Will by other Papers and Declarations; that would be to make them Part of the Will; whereas a Will is a compleat Act of itself, and repeals all former Wills and Declarations whatsoever. In this Case the Plaintiff can have no Relief; 1st, Because this Estate is given to Mrs. *Willoughby* on a Condition precedent, of her being married to Lord *Guilford* in three Years. Now the Nature of Condition precedent is, that it must be performed before ever the Estate can vest; and if the Performance of the Condition becomes impossible by the Act of God, yet the Estate could never accrue to her; so if it becomes impossible by any other inevitable Accident; as in this, if Lord *Guilford* had died within the three Years after the Death of *Cary*, before Marriage with Mrs. *Willoughby*, whereby the Condition becomes impossible by the Act of God, yet the Land could never accrue to her; this is the Law. I know of no contrary Precedent in Equity; the Relief therein hath always been in case of subsequent Conditions, which determine an Estate, and are not favoured in Law; as to which, if the Condition becomes impossible, the Estate shall not be defeated; but as to Condition precedent the Law requires strict Performance; and if that becomes impossible, the Estate can never arise. And as the Law is so, so is apparently, 2^{dly}, the Intent of the Testator; for he gives on Condition, which he knew was not in the sole Power of his Niece to perform. But then 3^{dly}, that, which makes it beyond all Contradiction, is the Codicil, which shews that he intended to give her the Estate, on Condition that there should be an indissoluble Estate between her and Lord *Guilford*; and the Estate after her Death is only given to such Heir Male, as should be begotten on her Body by the Lord *Guilford*; where

where an Estate has been given on Condition, and the Substance of the Condition has been performed, there Equity has relieved, because the Testator aimed at Substance, and not at Circumstances: This was the Case of *Popham* and *Rogers*; a Devise was made of Lands to Sir *F. Popham*, on Condition he should let two Thirds thereof descend to his Heir; he did not do so, but permitted other Lands to the Value of two Thirds to descend; and it was held in Equity to be a sufficient Performance of the Will; because the Design of the Testator was to make Sir *F. Popham* a good Husband, to provide for his Posterity; and the Intent of the Testator was satisfied thereby. Now here the Intent was, that she should marry Lord *G.* she marries one whom it doth not appear *Cary* had any Kindness for; the Case of *Fry* and *Porter* is stronger than this. Mrs. *Willoughby* was in no Fault at all, she did what Honour and Modesty would permit: And so Lord *C. J. Treby* agreed it was a hard Case, but cannot be help'd, the Will of the Testator ought to be observed; and his Estate in the same Manner, and on the same Conditions, as he limits it.

Lord Chancellor: Mrs. *Willoughby* was to take on a Condition precedent, nothing was to vest in her till after three Years; at which Time, if she was not married to Lord *G.* the Trust was to vest in Lord *Faulkland*; the previous Declarations of his Intentions signify nothing; the Will is an express Revocation of them all. As for the Conditions not being literally performed, if my Lord *Faulkland* had done any unfair Act to hinder her Marriage, he being to have Advantage by it, Equity might have relieved; but on the other Hand, I am not clear that she should be relieved, if my Lord *G.* had died, or refused to marry her. It may be a hard and unreasonable Disposition, we cannot help that, we cannot make a new Will. He differ'd in thinking she had done all that could be done by her; for she put Terms on my Lord *Guilford* where the Will put none, and which could not be reasonably required; but however that be, the precedent Condition is not performed, and it is not material to them in Remainder what the Reason of it is. It cannot be in this Case objected, that the Condition is performed in Substance, because the Condition is of a Thing which cannot be valued; Paying of Money, or Conveying an Estate, is of a Thing which will admit of a Valuation; but this Case of Marriage cannot. Then the Proceedings in the Time of the Chancellor *Jefferies*; it plainly appears by the Suggestion of the Petitions, and the Orders thereon, that the

the Lord Chancellor was not informed of the whole Matter; and it is evident they designed he should not, for there was only a Petition, and no formal Bill, wherein all Parties interested might be made Parties to it, and have been heard what they had to say relating to the same. On the whole Matter, I think the Lady was to have no Estate, but on Performance of the Condition precedent, which she never did perform. I do not see that any Thing was sincerely done on her Part to answer the Intent of *Cary's* Will; there was a great deal done in a colourable Manner, but absolutely refused the Proposals made by Lord *Guilford's* Trustees, or did as good: Now the Defendant is a Stranger to all these Proceedings; and therefore I think on the whole that the Trustees ought to execute the Estate to Lord *Faulkland*, and the Heirs Males of his Body, Remainder to the right Heirs of *Cary* the Testator; and Mr. *Berty's* Bill be dismissed. Salk. 232. says it was reversed. 2. Appeal was had to the Lords, where no Determination, but ended by Compromise.

Rex versus Bishop of Chester & al'.

ERROR è C. B. in a *Quare Impedit*; the Question was, Sal. 560. Mod. 279. Par. Ca. 212. whether an Advowson granted to Sir *William Thexton* by King *Ch. 1.* passed; and *per Eyre, Rokeby* and *Holt*, it was adjudged that the Advowson did pass, and therefore Judgment ought to be reversed; *Turton* argued *econtra*. But another Point was started, *viz.* a Variance in the Grant, as pleaded from the Letters Patent. It is set forth in the Plea, that King *Ch. 1.* granted the Advowson *W. Thexton Armigero & postea Militi*, and the Letters Patent are *Willielmo Thexton Militi*; and for Reason of this Variance Judgment was affirmed, by *Eyre, Turton* and *Holt*; but *Rokeby contra*; because he said, a Grant made to a Man by the Name of Knight, who is not a Knight, is not void, so as *constet de personâ*; and there is nothing in this Record to oblige them to take *William Thexton* Knight, and *William Thexton* Esquire, for two distinct Persons; and therefore the Court would never intend it on Purpose to make void a Grant; but by the other three it was held, that a Man who is not a Knight cannot take by the Name of a Knight; for 1st, Knight is Part of a Man's Name, as is held by all the Books without Contradiction, and is not only an Addition. 4 H. 7. 7. 32 H. 6. 29. 8 Ed. 4. 23. a. 2 Inst. 594. Hutt. 41. 2^{dly}, A Knight is a Name of Dignity, and a 9 Co. 49. b. Name

Name of Dignity is as much Part of a Man's Name, as his Christian Name; and a Grant made to a Man by a wrong Christian Name cannot be good; it must *constare de persona* not in the Plea only, but in the Grant it self. Now it does not appear by that, that *William Thexton* Knt. and *William Thexton* Esq; are the same Person; now the Name of Esq; is certainly drown'd in the Name of Knight; for all Names of Worship are drown'd in Names of Dignity. But it is objected, that tho' a Man be no real Knight, yet he may be a reputed Knight; so a Name of Reputation will be a sufficient Description to take by: To which it was answer'd, 1st, That he that is a reputed Knight, and yet is not a Knight, cannot take by that Name; for where a Man takes by Name of Reputation, there must be some Foundation to ground that Reputation upon; as there is in Case of a Bastard, who takes by Name of a Son; but there is no Foundation for a Man to be a Knight who is no Knight. But it may be objected, that Names of Dignity may be supported by Reputation; as the eldest Son of a Duke hath the Title of Marquess or Earl. Now suppose a Grant was made to the eldest Son of a Duke, by the Name of Marquess, that Grant would be good, because there is a Foundation for it: For by the Laws of Heraldry, every Duke's eldest Son takes Place as Marquess, that is, after all real Marquesses, and the common Usage of the Realm gives them those Titles in all Writings now a-days; but the old Conveyances were cautious in so doing, they called them such a one Esquire, commonly called Marquess, &c. and even in modern Conveyances they are always mentioned to be the Eldest Son of such a one. It is said by *Hutton* and *Richardson*, in the Debate of the Earl of *Pembroke's* Case, *Lit. Rep.* 223. that if Grant be made to one by the Name of Knight, who is no Knight, it is a good Grant; but there is no Foundation for it; for if that be so, a Name signifies nothing; and *Tho.* may as well take by the Name of *John*, as an *Esquire* by the Name of *Knight*: But supposing Reputation would have done, yet the Defendant should have averred, that he was an Esq; *sed cognit' & reputat'* by the Name of Knight. *Per Eyre*: If a Feoffment be indeed made to a Man by a wrong Name, but Livery is made to him in Person, there the Feoffment is good, because *constat de personâ*. And the Books put a Difference between a Grant that has its Operation by a Deed it self, and where it is by Livery; in the former it cannot be good, in the later it is. In the Case of the Earl of *Pemb'*, *Lit. Rep.* 181, 197, 223. 1 Cr. 173.

Vide 8 Co.
16. b.

70. 215. the Issue in a *Quare Impedit* was, whether Sir *William Sandys* granted the next Avoidance by the Name of Sir *William Sandys* Esquire; and the Court held, that the Verdict had made this a good Grant, but without that it had been void. As to Lord *Ewer's* Case, 2 Cr. 240. 1 *Bulst.* 21. a Grant was made to my Lord *Ewer* by the Name of *R. Ewer* Knt. Lord *Ewer*; tho' he was not a Knight at that Time, the Grant was held good; but the Reason of that was, because it was a sufficient Description of the Person, there being but one Lord *Ewer* at the Time; as in *Co. Lit.* 3. a. if Lands be given to *R. Earl of Pemb'*, when his Name is *Henry*; or *George* Bishop of *Norwich*, when his Name is *John*; the Grant is good, because there can be but one Earl of *Pemb'*, or Bishop of *N.* at a Time; but here the Grant is to Sir *William Thexton* Knight, and the Defendant pleads it to *William Thexton* Esquire, which are two several Persons; for which Reason Judgment ought to be affirmed. This Judgment was afterwards reversed in the House of Lords.

D E

Term. Paschæ,

Anno 10 W. III. in B. R.

Smith verſus Johnson.

CASE for Work done on a *Quantum meruit*, and Money to be also an *Indeb' Assumpsit*; upon Motion to bring so brought into much Money into Court, and to be struck out of Court on *Assumpsit*, but the Declaration, the Court granted it as to the *Indeb' Assumpsit*, but refused it as to the *Quantum meruit*; and Court said, that such Motions had been sometimes obtained,

Ante p. 90, 95.
 Postea Mich. 10 W. 3.
 Lawley v. Dibble. Pasch. 12 W. 3. Farrell's Case.

obtained, where a *Quantum meruit* and *Indebitatus* were joined together; yet regularly they ought not to be granted on a *Quantum meruit*, for who can tell what a Man deserves, till it be tried.

The King versus Haggard.

Certiorari to remove an Indictment out of *Westmorland*, for using a Trade not being an Apprentice.

Indictment at Kirby in *Westmorland* on the 5 *El.* for using a Trade, not having been Apprentice thereto seven Years; and a *Certiorari* was prayed; but the Court doubted whether to grant it; because the Statute is, that it must be tried in the proper County; so that if it be removed hither, it must be sent down again by *Procedendo*, and not filed here, so as to be quashed; but there having been several such *Certiorari's* granted, they granted one in this Case; and afterwards granted another in a like Case in *Trinity* Term following, in the Case of one *Woods* of *Norfolk*.

Temple versus Bishop.

Bill of *Middlesex* taken out by four, abates by Death of one; and new Writ must be taken out by Survivors by Journeys Accounts.

'T was held *per Cur'*, that where four took out a Bill of *Middlesex*, by the Death of one of them the Writ abated; and a new Writ should have been taken out in the Name of the three Survivors, by Journeys Accounts; and when one of them died, the Bill abated, and a new Bill should have been taken out in the Name of the two Survivors, only by Journeys Accounts.

Chaloner versus Claiton.

Avowry. Comb. 472. Whether in Rejoinder a Title must not be set forth. 2. Vide postea p. 191.

Replevin; the Defendant avowed for Rent, that he was possessed of a House for divers Years then and yet to come, and that he leased it to the Plaintiff from Year to Year, &c. the Plaintiff replied *Nil habuit in Tenementis*; Defendant rejoined *Quod satis habuit in Tenementis*; and upon Demurrer to Rejoinder it was alledged, that the Defendant in the Rejoinder should have set forth a Title. But *Northey* for the Defendant moved, that there was no Necessity so to do; for tho' in Debt for Rent, if the Defendant pleads in Bar *Nil habuit in Tenementis*, the Plaintiff in his Replication must shew a Title; because in Debt for a Rent, the

the Plaintiff is not obliged to shew a Title in his Declaration, but *quod cum dimisit* is sufficient; yet in an Avowry it is otherwise; for in an Avowry some Kind of Title must always be shewn, as was here; *viz.* that he was possessed for divers Years then and yet to come; which being done, there is no Necessity to set out a Title again in the Rejoinder; whereon the Court took Time to consider; and after *Northey* said, he could not make good the Avowry, and therefore prayed Leave to amend, paying Costs: *Quod Cur' concessit.*

Brag and Digby.

CASE on several Promises; on Original Defendant, Oyer. without craving Oyer of the Writ, pleaded a Variance between the Writ and the Count, shewing particularly wherein. Whereupon Plaintiff demurr'd; for tho' the Writ be in Court, yet it is on a distinct Roll from the Count; and no Advantage can be taken of it, without craving Oyer; *quod Cur' concessit*, and a *Respond. ouster* awarded: Variance between Writ and Count cannot be pleaded without craving Oyer of the Writ.

Carter versus Shepherd.

TROVER for a Goldsmith's Note for 100*l.* the Fact was; C. had a Note of *Shepherd's*, while S. was paying him the Money C. put 50*l.* into his Bag of the Money, after it was told, and laid it on the Counter while the rest was telling; during which Time the 50*l.* in the Bag was stolen; and the Question was, whether *Carter*, by putting the Money in the Bag, had so appropriated it to himself, that he should stand to the Loss thereof; and the Court held that he should; for the Possession of it was the same as if he had put it into his Pocket, and he might have Detinue for it, after it was in his Bag; and accordingly the Court ordered, that whereas he had a Verdict for 100*l.* he should have Judgment for 100*l.* and make a Release for 50*l.* on Record. Property. Salk. 507. Comb. 475. By receiving Money, and putting it into a Bag, the Property is altered, and Detinue will lie for it.

Dubarton versus Chancellor.

CASE on several Promises; Plea in Abatement, and *Respondeas ouster*; *Non assumpsit* pleaded, and carried down to Trial by *Nisi prius*, and Verdict for the Plaintiff; Record. Plea in Abatement, and Judgment thereon, should be entered on the Issue-Roll.

C c c

Plaintiff; and it was moved, that the entire Record was not carried down; for the Plea in Abatement, and Judgment thereon, was not entered on the Issue-Roll, which they ought to have been, and not to have made two Rolls; for the Plea in Bar ought to be entered on the same Roll with the Plea in Abatement; and special Verdict; and for this the Verdict was set aside.

King and Morrice versus The Mayor and Commonalty of Lincoln.

5 Mod. 402.
Oaths.
Quakers may
take their so-
lemn Affirma-
tion on Ad-
mission to their
Freedom.

M *Andamus* to admit *Morrice* to the Freedom of the City of *Lincoln*, he having served seven Years Apprentice; which the Mayor refused; because he refused to take the Freeman's Oath, he being a Quaker, but offered to make his solemn Affirmation according to the late Act, 7 W. 3. c. 34. And the Court were of Opinion, that he ought to be admitted on his solemn Affirmation; for the Office of a Freeman is no Place of Profit, or Office in the Government, within the Statute: By his Serving his Apprenticeship he had a Right in the Freedom, and his Admission, whereunto the taking of an Oath is not essential, but only by Custom; and the Intent of the Act was, that, unless in those Cases excepted by *Proviso*, the Affirmation of a Quaker should be as available as his Oath; and tho' it was returned in this Case, that every Freeman had the Liberty to run a Cow upon the Common within the said City; yet that will not alter the Case; but because the Writ was directed to Mayor of the City of *Lincoln* in the County of *Lincoln*, and not in the County of the City of *Lincoln*, the Writ was quashed; there being no such Persons to whom a peremptory *Mandamus* should go.

Silly and Dally.

Salk. 562.
Carth. 444.
Comb. 476.
In Avowry,
when ever Ti-
tle is made
under a parti-
cular Estate;
the Com-

R *Eplevin*. Defendant makes Conusance as Bailiff to *J. T.* for that long before *J. T.* Grandfather of the present *J. T.* was possessed for 500 Years, commencing from the 30th of *July* 1645. of a certain Messuage and fourteen Acres called *Treleage* in the Parish of *St. Brago*; and also of another Messuage and forty-four Acres called *Trevanion* in the

mencement of it, and the Original whence derived, must be set forth in Pleading.

same Parish; of which last mentioned Tenement the Place where is Parcel; and that being so possessed 1 Aug. 1645. he leased for 499 Years, three Quarters of a Year, two Months and three Weeks to *A. B.* reserving 16*l.* *per Annum*; and the Grandfather, being possessed of this Reversion of a Term, made his Will, and made *J. T.* Father of the present *J. T.* and *Jane* his Wife, Executors jointly and residuary Legatees; that *Jane* died, and *John* survived; that *J.* died, and made the present *J. T.* his Executor, as Bailiff to whom he made Conusance for the 16*l.* Rent arrear. Plaintiff demurred; because not said how the Grandfather was seised, or who made that long Lease; and the Estate not set out, out of which the Lease is derived; for whenever the Defendant in an Avowry sets out a Title in a particular Estate, he must shew from whom the Estate is derived. 1 *Inst.* 303. *b.* 1 *Cr.* 571. *Scavage* and *Hawkins.* Ante p. 188; *Yelv.* 147. *Witham* and *Barker.* 1 *Cr.* 138. *Skewill* and *A-* 189.
very. *Per Cur'*: It is true, that if the Lessor brings Debt for Rent against the Lessee or Assignee, he need only say *quod cum dimisit*, without shewing his Estate; but an Avowry is different from a Count in this as well as in other Cases; for if you declare in Debt for Rent, there one Plea goes to the whole Declaration, as *Nihil debet* does; but no general Plea goes to the whole Avowry; if in this Case you had set forth a Seisin in Fee in some one who made the Lease to *J. T.* it had been very proper to have traversed the Seisin in Fee; but instead of a Seisin you have alledged a Possession; and there never was seen such a Traverse, as *absque hoc Possessionat' fuit*: Besides, wheresoever you set forth a particular Estate, you must shew the Original from whence it is derived; if you have the Seisin in Fee, it is sufficient to alledge that generally, because that gives him a good Title against all Men, except the Disseisee. But now particular Estates are not framed by the Law, but by Contract; and therefore you must shew what that Contract is, and how it came to be made; if it is carved out of an Estate that is able to support it; and therefore because the original Estate is not set out, from whence this particular Estate is derived, the Avowry is ill; and *Jud' pro Quer'*. In this Case was cited the Case of *Harris* and *Parker*, 2 *Vent.* 253, 270. which was Debt for Rent on a Demise by Plaintiff to Defendant; Defendant pleaded that Plaintiff *nihil habuit in Tenementis*; Plaintiff replied, that he was possessed of a Lease of forty-one Years made to him by the Lord *W.* who had full Power to demise;

Postea Pasch.
 13 W. 3. Pell
 v. Garlick.

Vide 2 Cro.
 43, 46, 52, 70.
 Diversity.

mise; and tho' the Judgment was reversed for a Fault in the Declaration; yet the Replication was held good, without setting forth a Title; which *Holt* said was true; and that in that Case it was not necessary to set out a Title, for *Nihil habuit in Tenementis* was the Issue; for if Defendant plead *Nihil habuit in Tenementis*, the Plaintiff may reply *quod satis habuit in Tenementis*, viz. in feodo, or any other Estate, on the Trial whereof he may give any other Estate in Evidence, the Alledging any particular Estate being only Form; the Issue being, whether he had any Thing in the Premises: It was also said by *Holt*, that the Case of *Witham* and *Barker* in *Yelv.* 147. was a hard Case.

Oldfield and *Sir Rich. Raines*, Judge of Consistory Court of the Bishop of Lichfield and Coventry.

School.
Whether a
Layman may
be sued in the
Spiritual Court
for teaching
School without
Licence.
Salk. 672,
330.
Carth. 464.
Comb. 324.

Oldfield was libell'd against in the Spiritual Court ex *Officio*, for teaching School contrary to the 77th Canon, anno 1603. which is, that no Man shall teach School except licensed by the Bishop, and otherwise qualified as the Canon prescribes; and now *Oldfield* prayed a Prohibition; suggesting that every Man at Common Law may teach and instruct another; that all Canons contrary to the Law of the Land are void, and do not bind the Laity, whereof he is one; that the Statute of 1 *Jac.* and 13 *Car.* 2. have appointed Penalties for keeping Schools without License; and that the Exposition of all Statutes belongs to the King's Courts; and the single Question was, how far this Canon binds a Layman; which *Holt* said was no Question to be determined on a Motion; and therefore granted a Prohibition, and that they declare upon it.

At Guild-hall *coram* Holt.

Clerk versus *Pigot*.

Salk. 126.
Name endorsed
on a Bill of
Exchange
may be used
as an Assignment,
or for Discharge
when paid.

*I*N *Assumpsit* on a Bill of Exchange, the Case was: *Dun-kin* drew a Bill of Exchange at *Bristol* on *Pigot* in *London*, payable to *Clerk* or Order, at twenty-eight Days Sight; *Clerk* living at *Bristol* sends the Bill with *Keen* to *London*, with his Name indorsed thereon, but a Blank Space over his Name; *Keen* presents it to *Pigot*, who accepted it, and for

for Non-payment *Clerk* brought this Action. And it was alledged, that the Action should have been brought by *Keen*; because, by *Clerk's* indorsing his Name, the Property was transferred from him to *Keen*. But the Chief Justice held, that there being a Blank Space left over the Name of *Clerk*, as is usual in Bills of Exchange, it was at the Election of *K.* either to make Use of it as his Servant, or Order; if he had filled up the Blank Space, with making it payable to him, as he might have done, if he would; then the Property of the Bill had been transferred to him, and he only could have maintained this Action against the Acceptor; but seeing he has not filled up the Blank Space, he thereby declares his Intention to have acted only as a Servant of *Clerk's*, whose Name was put there, that, on Payment thereof, a Receipt might be writ for the Money over his Name; *ideo* Action maintainable by *Clerk*.

Postea Mich.
10 W. 3.
Lambert v.
Oakes.

Cromwell and Grumfsdale.

DE BT against Defendant, Administrator of *Roger Urlin*, for 40*l.* for that the said *Roger*, 10th of *July* 1674, *per scriptum suum obligatorium, cujus datus est eisdem die & anno supradicti, cognovit se teneri & firmiter obligari prout Georg' in prout quadraginta libris, per hac verba; quadrans lib' payable on Request; Defendant pleaded Non est factum predicti Richardi Urlin; the Jury find, Quod quidam R. Urlin Intest' prout Grumfsdale did seal and deliver a certain Writing in Form of an Obligation, in hac verba; by which he obliged himself to the said George Cromwell per mid viginti in quadrans lib' bone & legalis monetae Angliae, ad quam quidem solutionem he obliged himself, his Executors, Administrators and Assigns, firmiter per presentes sigillo sigillat', dat' primo die July anno regni Regis Ca. 2. 1674. conditioned for the Payment of 20*l.* 12*s.* on the 25th of *December* next ensuing the Date thereof, &c. &c.*

5 Mod. 281.
Salk. 462.
Comb. 477.
Bond.
If what was
the Intent of
the Parties can
be understood,
the Bond is
good.

And *Holt*, who delivered the Opinion of the Court, said that the Bond was as silly and inartificial as could be; yet the Intention of the Parties being apparent, the Plaintiff must have Judgment; as for the *Quadrans lib'*, if there had been nothing further to explain it, we should have made nothing of it, but the Word *Quadrans* here being something of four, and it appearing by the Condition to be for the Payment of 20*l.* we cannot understand it to be meant of any

D d d

other

Postea Mich.
10 W. 3. Pul-
len v. Benson.

other Sum than 40 l. and if the Meaning does sufficiently appear, we ought to construe Bonds and Agreements not according to the strict Words, but according to the Intention of the Parties. *Sessanta* is as unintelligible as this, and so is *quantoginta*, *Th. Jo.* 48. We have searched the Rolls of *Dodson* and *Key's* Case, and find it exactly the same, as reported in *Yelv.* 193. As to the *Per mid viginti*, that is insensible, and therefore cannot hurt. Then as to the *Cujus dat'* in the Declaration, there is no such Date as *Anno Regni* 1674. it is a void Date; and Plaintiff may allege the Deed to be made when he will; and tho' by the *Profert hic in Cur'*, he has confin'd himself, yet the *Cujus datus* shall be understood of the Delivery, and not the Date; *cujus datus* shall be the giving of which was *Ec.* if it had been *gerent'* Date, it might have been otherwise, but here it is good enough; *ideo Jud' pro Quer'*.

Atkinson versus Cornish.

5 Mod. 395.
Carth. 446.
Salk. 39.
Administra-
tion granted
durante minore
etate of an
Executor,
ceases at Se-
venteen; of
an Administra-
tor at twenty-
one.

Postea Mich.
12 W. 3. Du-
bois v. Trant.
Pasch. 13 W.
3. Reek v.
Thomas.

PLaintiff brought an Action as Administratrix of her Husband during the Minority of her four Children, *A. B. C. D.* Administrators *cum testamento annexo*; and avers they were under the Age of twenty-one. Defendant pleads that *A.* the Eldest was of full Age the first of *October* last; Plaintiff replied, that he was not then of full Age, and tendered an Issue; Defendant demurred; and it was objected that Judgment ought to be for Defendant; because the Plaintiff did not aver the Children were under the Age of seventeen, (at which Time Administrator *durante minoritate* should cease), but only under the Age of twenty-one Years. *Sed per Cur'*, The Diversity is, if Administration be granted *durante minoritate* of an Executor, there Administration shall cease when the Executor comes to Seventeen. but if Administration be granted *durante minoritate* of one who is not an Executor, but only Administrator, there Administration *durante minori etate* does not cease till twenty-one. *Jud' pro Quer'*.

D E

Term. Sanct. Trin.

Anno 10 W. III. in B. R.

King versus Kitchner.

Indictment for causing an Apprentice to absent himself from his Master, and Keeping and Detaining him in that Absence. It was moved to quash it, because not a Thing of a publick Nature, being no other than an Action on the Case; but Court said it was a great Offence, and would not quash it; but left Party to demur, if he would.

6 Mod. 99,
182, 289.
Salk. 380.
Indictment for
inticing away
an Apprentice
not quashed
on Motion.

Williams versus Drury.

A*ssumpsit.* Defendant pleaded Misnomer in Abatement; whereupon the Plaintiff demurr'd, because the Defendant had laid no *Venue*; but Court held, that there need not in this Case, because it is a Plea concerning the Person, and so must be tried where the Action is brought.

Misnomer
may be plead-
ed in Abate-
ment, without
laying a *Venue*.
Ante p. 125.
1 Saund. 8.
6 Mod. 105.

Toms versus Loyd.

CASE for Money received to Plaintiff's Use; Defendant pleaded his Privilege in the Exchequer, whereon the Plaintiff demurr'd; and Judgment for Defendant; who prayed Costs by Virtue of 8 & 9 W. 3. c. 11. whereby it is enacted, that for preventing frivolous and vexations Suits, that if on any Demurrer Judgment shall be given against the Plaintiff, the Defendant shall have Judgment to recover his Costs.

Where Judg-
ment is for the
Defendant, in
a Plea in A-
batement, shall
not have Costs.
Salk. 194.
Comb. 482.

Costs. But Court were of Opinion, that Judgment on Demurrer, upon a Plea in Abatement, for Defendant is not within this Act; the Intent of the Act being only to give the Defendant Costs, where the Plaintiff should have had it, if Judgment had been given for him. Now if the Plaintiff had Judgment on Demurrer, in a Plea in Abatement, he hath then no Costs, tho' there be some Consideration thereof, at the End of the Cause, in Costs. Besides, the Intent of the Act is to prevent frivolous and vexatious Suits; and on Judgment for the Defendant, on a Plea in Abatement, it doth not appear to the Court that the Action is either frivolous or vexatious; so that it must be understood of a Demurrer, where there is a Judgment final.

Wilkins versus Mitchell.

Mandamus refused to execute a Judgment in an Inferior Court, must be by Writ *De executione judicii* out of Chancery.

DEBT for Rent in the Court of *Cambridge*, where upon the Evidence the Plaintiff was nonsuited; the Defendant had Judgment, but the Mayor refused to execute the same, taking Security from the Plaintiff for his Indemnity; whereon a *Mandamus* was moved for, or that the Mayor should shew Cause why he should not execute the said Judgment; but the Court denied the Motion, seeing he had a legal Remedy, *viz.* a Writ *De executione judicii* out of Chancery.

Gardner versus Booth.

Salk. 548. On Suit for Tithes, Suggestion of a *Modus*; the Suggestion must be proved.

A Prohibition was granted in a Suit of Tithes, on a Suggestion of a *Modus*; and Consultation was prayed, because they had not proved their Suggestion: And *per Cur.* supposing the Plaintiff had declared in a Prohibition, and the Defendant had pleaded thereunto; yet the Suggestion, by Force of the Statute, must be proved within six Months. But then the Suggestion is entered on the Roll, and for that the Roll must be brought into Court, that it may be seen whether there be a Proof thereon or no; after which, it appearing no Proof had been made, a Consultation was awarded.

The King versus James.

Indictment in the Grand Sessions of *Wales*, and *Certiorari* granted to remove it, at the Prayer of the Defendant; and now a *Superfedeas* was prayed to the Writ; because a *Certiorari* does not lie into *Wales*; or if it does, it is only when the King directs, or desires it, and not at the Desire of the Defendant: But Court held that *Certiorari* lies either at the Desire of the King, or of the Party, according as the Court shall think fit; and accordingly a Rule was given for the Return of the *Certiorari*, and that the Indictment should be tried in the next *English* County.

Certiorari lies into *Wales* at the Desire of a Party, if the Court thinks fit.

William Ellis versus *Grace Ellis*, *Executrix* of *John Ellis* Son of the said *William Ellis*; *Intr'* Mich. 9 W. 3. Rot. 190.

INDEB' *assumpsit* on two Promises for 100*l.* Defendant pleaded Infancy in her Testator at the Time of the respective Promises; the Plaintiff replied, *Protestando* that he was not an Infant at the Time of the Promises, *pro placito dicit* as to the said two Promises, *quod ipse erogabat, extraponebat & solvebat* 60*l.* *parcell' inde, & quamlibet parcellam præd'* 60*l.* *pro cubiculis, Anglicè* Lodgings, *pro præfat' Johanne Ellis, & prædict' Gratia, (præd' Johanne & præd' Gratia conjugat' existent'), ac pro emptione necessariorum, & potu, & victu & Sustentatione corporum præd' Johannis & præd' Gratia, & familie sue, prædict' Johanne ad tunc habente liberos & hoc paratus est verificare, &c. Et quoad* 40*l.* *resid' inde & qualibet parcella præd' quadraginta lib' fuerunt pro emptione necessariorum, &c. & sic præd' 40l.* *per ipsum Will' Ellis præfat' Johanni mutuo dat' & accommodat', & per præfatum Johannem Ellis mutuo habit' & recept' per præfatum Johannem Ellis expendit' & erogat' & extraposit' fuerunt, &c. & hoc paratus est verificare.* Whereon the Defendant demurr'd in Law; and it was not now questioned, but that an Infant shall be chargeable for Necessaries for his Family, as well as for himself; but the great Objection to the Replication was, that tho' a Man may find Necessaries for an Infant, yet he cannot safely lend Money to an Infant, to provide Necessaries for himself. As to which, the Court were of Opinion, that if the Infant spends the

5 Mod. 368.
Comb. 482.
Infant chargeable for Money lent to buy Necessaries, if so laid out.

E c e

Money

Salk. 386.

Money otherwise, then he should not be chargeable; but if he lays it out in Necessaries, according to the Lending, as it is averr'd in the Replication he did, then he shall be chargeable; because it is the same as if the Lender had bought the Necessaries for him; which Employment being traversable, a *Venue* should have been laid; for which Commission Court gave Judgment *quod querens nil capiat per Billam*.

King versus Dixon and Hollis.

Parish to be indicted for not Repairing a Highway, and not the Overseers.

Indictment *versus* two Defendants, who were Overseers of the Highway, for not repairing or causing to be repaired the Highways; and quashed, because an Indictment for not Repairing must always be against the Parish; the Overseers not being bound to repair the Ways, but only to give Notice to the Parish to come and repair them.

Error *è C. B.* An Action was brought there by an Attorney, by Bill of Privilege, and no *Plegii de prosequendo* found, and so return'd on a *Certiorari*; and for that Cause Judgment was reversed.

King versus Sir Henry Bond Baronet.

Indictment of Treason is not to be quashed for Want of Addition, unless the Person takes Advantage of it.

SIR *H. Bond* brought a Writ of Error to reverse an Outlawry for High Treason, and assigned for Error, that whereas the Statute of 1 *H. 5. c. 5.* doth enact, that in every Indictment, &c. there should be Mention made of the true Addition of their Profession, Faculty or Mystery, or Estate and Degree, and that the Place of his Commorancy should be mentioned; *unde ex quo* that in the Indictment he is not named *Baronet*, nor hath other sufficient Addition, *in hoc est Erratum*; and so likewise as to the Place of his Commonancy; he assigned also another Error in the Process of Outlawry, *viz.* the Want of a *Capias*; which the Attorney General confessed; whereon his Outlawry was reversed; and being arraigned on the Indictment, *Holt* said, that Sir *H. B.* had his Election, either to take Advantage of the Exception to the Indictment, for Want of Addition, or wave it, and plead the King's Pardon; for the Indictment is not to be quashed by the Statute, except he takes Advantage of it; and accordingly he waved his Exception, and pleaded his Pardon.

The King versus Robert Fielding.

Robert F. was attainted by Outlawry for High Treason by the Name of R. T. Esquire, and in Term had his Pardon allowed; and now he brought a Writ of Error, and assigned for Error, that at the Time, and before, and after the Caption of the Indictment, he was known by the Name of Robert F. Yeoman, and not Armiger, as in the Indictment. Holt said, it were a better Assignment to have recited the Stat. 1 H. 5. c. 15. but however it may be sufficient, that being a general Law, and concerning the King, the Court would take Notice of it. But the Doubt was, whether he had not estopped himself from taking Advantage of that Mistake, by his Manner of coming in and assigning it, which was & *præd* Rob. Fielding dicit, that he is the Person mentioned in the Record of the Indictment; whether the *Præd* did not admit the Addition as in the Indictment. Darnell, Shower and Northey, that it admitted no more than Identity of the Person, and not the Truth of the Addition; the Falsity of which, as well as the Omission, is Error. Holt: The true Answer is, that there could be no Estoppel; for the Outlawry was returned Hill. 1 W. & Mar. at which Time he stood indicted by a wrong Addition; but not rendering himself till long after, he had no Opportunity to plead it, but could only use the King's Pardon, or say he was not the same Person mentioned in the Indictment, especially it being confessed by the King's Attorney General.

Statute of 1
H. 5. c. 5. of
Additions, is
a general
Law, of which
the Court will
take Notice.

Saunders and Owen.

ERROR of a Judgment in the C. B. in an Assise of Novel disseisin brought against him by Owen, for the Office of Clerk of the Peace of the County of Kent; in which Assise the Plaintiff for Title set forth, that the Office of the Clerk of the Peace for the County of Kent was an antient Office, and that the Statute of 1 W. & M. c. 21. enacts, that the *Custos Rotulorum*, or other Person to whom it belongs to nominate the Clerk of the Peace, shall appoint one able and sufficient Person, residing within the County, to be Clerk of the Peace, for so long Time as the said Clerk of the Peace shall well demean himself in the said Office;

Salk. 467.
5 Mod. 386.
Carth. 426.
Custos Rotulorum may by
Parol, without
Deed, appoint
a Clerk of the
Peace.

Office; that the 15th of *July* H. Earl of *Winchelsea* appointed him to be Clerk of the Peace, whereof he was seised *ut de libero Tenemento pro termino vite*, &c. till the Defendant disseised him. Defendant pleaded *Nul tort nul Disseisin*; and upon Issue joined a special Verdict was found, that the Earl of *W.* was *Custos Rot'* of the County of *K.* that the Office of Clerk of the Peace was vacant; that the 12th of *July* the Earl, by Writing under Hand and Seal, appointed the said *Phil. Owen* to be Clerk of the Peace, *durante beneplacito* of the said Earl; that after the 15th of *July*, at the General Quarter-Sessions the said Writing was shewn to the Justices of Peace; and a Question arose among them of the Validity of the Grant, and they refused to admit him; afterwards, at the same Sessions held by Adjournment at *Cant'*, by the Earl of *W.*'s Orders the said Writing was read in Court, and then at the same Sessions, *absque ulla relatione ad scriptum prad' habita*, the said Earl spoke *hac verba sequentia in his Anglicanis verbis*, I do nominate and appoint the said *P. Owen* to be Clerk of the Peace according to the Act of Parliament; and afterwards *Owen* was admitted; then the Earl died, and the Earl of *Rumney* was made *Custos Rotulorum*, who granted the said Office to *Saunders quamdiu se bene gesserit*, &c. And *Holt* delivered the Opinion of the Court, and said, that in this special Verdict two Points are to be considered; 1st, Whether the *Custos Rotulorum* can by Parol, without any Deed, appoint a Clerk of the Peace. 2^d, If he can do so, whether these Words of the *Custos Rotulorum* be a sufficient Appointment and Nomination. 1st, We are all agreed, that he may appoint a Clerk of the Peace by Parol. But 2^{dly}, that this is not a good Appointment by the Act.

Ante p. 42.

As to the first Appointment by Parol, it is good, for it is but an Execution of a Power, and not a Deriving any Interest he has in himself; and a Grant it cannot be, for a Granter ought to have an Interest in himself to grant; and the *Custos Rotulorum* hath at most but an Interest at Will, and the Interest of a Clerk of the Peace is a Freehold; and therefore his Estate for Life, being a greater, cannot be derived out of his Interest, which is less; and that the Clerk of the Peace has a Freehold, and is not removeable on the Death or Removal of the *Custos* is not now a Question; being so adjudged here in *Harcourt* and *Fox's Case*, and affirmed in the House of Lords. Now if a Man be seised in Fee of a Manor, or of a Park, and he makes a Bailiff, or a Keeper for Life, this must be by Grant and by Deed, because

because it is an Interest derived out of his Inheritance ; but this is rather like Tenant for Life, with a Power to make Leases for three Lives ; which being in Pursuance of a Power, there is no Necessity of Livery and Seisin, because it is only the Execution of an Authority ; but where a Man makes such Leases, by Virtue of an Interest which he hath in the Land, they are not good without a Livery and Seisin. So when a Man, by Virtue of an Interest which he hath, grants an Office for Life, it must of Necessity be by Deed ; but if he doth it by Virtue of an Authority only, there needs no Deed at all. So if a Man devises, that his Executors shall sell his Lands, they may sell without Livery, 1 *Inst.* 113. because it is done by Virtue of a Power, and not by Way of conveying any Interest from them. It hath been objected, that the *Custos Rotulorum* doth not only appoint and nominate the Clerk of the Peace, but also doth give and grant the said Office ; because the Words of the Statute of 37 H. 8. are, *give and grant the said Office* ; and the Statute of 1 W. & M. being made on the Foundation of 37 H. 8. must be construed agreeably thereunto. But suppose a Deed was necessary by the Statute of 37 H. 8. yet not so by 1 W. & Mar. because by 37 H. 8. the Estate of the Clerk of Peace determined with the Interest of the *Custos Rotulorum*, so that the *Custos* granted no more than he could grant. But now by 1 W. & M. he grants an Interest that shall continue, tho' he be removed or die. But notwithstanding the Words *Give and Grant*, a Deed was not necessary, by the 37 H. 8. because *Give and Grant* are general Words, and comprehend all Manner of Dispositions ; they are Words of *Surrender*, Release, and also of Limitation and Appointment, *secundum subjectam materiam* ; and in the 37 H. 8. there are the very Words *limit and appoint*, which shews all their Terms to be synonymous, and to mean no other than a Nomination and Appointment. There is not any Law requires a Nomination or Appointment to be by Deed. A Nomination by Parol is as much an Appointment as by Deed. A Rent assigned, in lieu of Dower, may be by Parol, without Deed, tho' it be a Freehold created *de novo* ; and tho' a Rent lies in Grant, because this is not properly a Grant, but an Appointment. So in case of Partition ; if Rent be assigned for Owelty of Partition, if there be three Parceners, and Rent assigned to two, if it were a Grant they would be Jointenants, and the Rent would survive ; whereas, it being but an Appointment, if either of them dies, the Rent shall go to the Heir of the Deceased,

and not survive. Where Corporations have Power by Prescription to nominate a Town-Clerk, the constant Practice is never to nominate them under the Common Seal, but only to elect him; yet he has an Estate for Life, and may maintain an Assise for his Office. In *London* indeed it is customary to grant it by Deed, but in other Corporations not. In *Hunt's Case*, *Dy.* 152. where a Custom was alleged, that the Lord Admiral should constitute a Registry, for and during the Term of his Life; it was adjudged he might nominate without Deed.

But as to the second Point, which was not much insisted on in the *C. B.* we are all of Opinion, that this is not a good Nomination. The finding the Earl of *Winchelsea's* coming to the Sessions was a good Inchoation of the Nomination; but the Words themselves are not sufficient. 1st, It is not said that he nominated him to be Clerk of the Peace of the County of *Kent*, there is not one Word mentioned of any County whatsoever. 2^{dly}, The Words are, *I appoint him to be Clerk of the Peace according to the Act of Parliament*; by the Act he is first to nominate the Clerk. 2^{dly}, to describe the Manner of his Execution, by himself or sufficient Deputy. 3^{dly}, He is to limit the Continuation of his Office, *quamdiu se bene gesserit*; all these Things are to be done. Now when a Man is to do three Things together, and he only doth Part, that is void. Now the Nomination of Clerk of the Peace is but one Part of his Power. 3^{dly}, It is uncertain what Act of Parliament he meant, for there are two Acts relating to the Nomination of the Clerks of the Peace, *viz.* 37 *H.* 8. and 1 *W. & M.* the one of a Nomination at Will, and the other to a Freehold. 4^{thly}, Tho' it be found that the Words were spoke without any Relation to the Deed; yet, as they are found, it is impossible but they must refer to the Deed; because the Words are, that he appointed the said *Phil. Owen*, and there is no *Phil. Owen* mentioned before but in the Deed, and in Relation thereunto; and if the Words refer to the Deed, it must be taken to be a Declaration of the Earl's Mind, that what he had done by the Deed was according to the Act of Parliament; but if it must be taken not to relate to the Deed, as it is found, then the Verdict is insensible and repugnant; because there was no *Ph. Owen* mentioned before, to which said *Ph. Owen* might have relation; wherefore we are of Opinion that this Nomination is void, and that the Judgment should be reversed. But this reversed in the House of Lords.

Clerk verſus Mundall, at Guild-hall.

INDE *B*' *assumpsit* for Wares ſold, *Non assumpsit* pleaded; at the Trial there aroſe a Queſtion concerning a Bill of Exchange; where *Holt* took this Difference, That if the Party, to whoſe Hands a Bill of Exchange comes, neglects to receive the Money from the Acceptor, there he ſhall not reſort to the firſt Drawer, becauſe he hath relied on the Acceptor, the firſt Drawer being only chargeable by Cuſtom, or Contract in Law. But a Bill, without Payment, ſhall never go in Satisfaction of a precedent Debt, or Contract, except it be Part of the Contract; as if *A.* ſells Goods to *B.* and *B.* takes a Bill in Satisfaction thereof; there, tho' this Bill be never paid, *A.* is diſcharged, becauſe it is Part of his Contract that *B.* ſhould take the Bill; but otherwiſe a Bill of Exchange ſhall never without Payment extinguiſh or ſatisfy a precedent Debt or Contract; and if only Part of a Bill of Exchange be paid, it ſhall only for that Part diſcharge a precedent Contract or Debt. This Caſe was concerning a Bill of Exchange drawn by one in *England*, payable to the Defendant, who indorſed it to the Plaintiff, ſending it to him for Money which he owed him in the Way of Trade; this was in *June* 1694. which Bill was never paid; and the Defendant inſiſted, that ſeeing the Plaintiff had not returned the Bill, but kept it a long Time in his Hand after it became payable, that therefore it ſhould be as ſo much Money paid him; But *Holt* ruled it to be no Payment.

Bill of Exchange.
Salk. 124.
If the Party to whoſe Hand a Bill of Exchange comes, neglects to receive it from the Acceptor, he ſhall not reſort to the Drawer. But different in reſpect of Indorſor.
Poſtea Mich. 10 W. 3. The Governor and Company of the Bank of England v. Newman, and Lambert v. Oakes.
Trin. 12 W. 3. Lord v. Francis.

King verſus Shaw.

AN Order was made by two Juſtices of the Peace againſt *Shaw*, the reputed Father of a Baſtard Child; whereupon he appealed to the next General Quarter-Sessions of the Peace, after he had Notice; where the Order of the two Juſtices was diſcharged; and the Order of Sessions being removed by *Certiorari*, it was moved to quaſh it; becauſe by 18 *El. c. 3.* the Appeal muſt be to the next General Sessions; and it may be there have been a General Sessions before the next General Quarter-Sessions; as in *London* and *Middleſex* there are four General Sessions in the Year, beſides the Quarter-Sessions; wherefore the Order of Sessions was quaſhed.

Appeal from Juſtices muſt be to the next General Sessions, and not next General Quarter-Sessions.

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Term. Sanct. Mich.

Anno 10 W. III. in B. R.

Brinsby versus *Gold*.

Action pending in an Inferior Court, no Plea in Bar to an Action in Superior Court for the same Cause.

I *NDEB' assumpsit* for Horse-meat; Defendant pleaded an Action depending in the Sheriff of *London's* Court for the same Cause; and held no Plea; because an Action pending in an Inferior Court is no Bar to an Action in a Superior Court, for the same Cause.

*Memini sæpius
idem audivisse
a Cur'.*

Per Holt: An Action on Escape is out of the Rule for changing a *Venue*.

Per Holt: The Plaintiff is not bound to pray a *Tales*, but only to bring in the Record for Trial; if he does not pray a *Tales*, the Defendant may.

Pullen versus *Benson*, Trin. 10 W. 3. Ret. 102

Salk. 628.
Date of a
Bond is the
Delivery of it.

DEBT on a Sheriff's Bond for Appearance, 20 Nov. 9 *Gul*, conditioned, that *William Benson* should appear in the *K. B. die Lunæ prox' post quinden' Martini Mich'* 9 *W.* Defendant pleaded the Statute of 23 *H. 6.* and that the Bond was delivered by him the 30th of *Nov. 9 W.* and that *William Benson*, at the Time of the Delivery and making of the Bond was taken and arrested by the Plaintiff, being Sheriff of *Yorkshire*, by a Writ returnable in the *K. B.* in *Mich.* Term last past; that being so in his Custody he took the said Bond from him; & *hoc paratus est verificare.* Whereupon the Plaintiff demurred, and shewed for Cause that the Plea was double.

double, and wanted a Traverse; and the whole Court held the Plea to be ill; because when he pleaded the Bond to be *primo deliberat* the 30th of *Novemb*, he should have traversed, *absque hoc*, that he delivered the 20th of *November*, according to the Case of *Green and Eden*, *Yel.* 138. 2 Cr. 264. for here the Date was material; for suppose the Arrest was before the Return of the Writ, and after the Return of the Writ he took an antedated Bond, this Bond is void; and therefore the Date is material, and ought to be traversed; and *per Holt*, the Date of the Bond is one Thing, and the Bearing Date another; the Date of the Bond is the Delivery of it; wherefore the Plaintiff had Judgment. Ante p. 194.
acc.

The King and Richard Rains.

M*Andamus* to Sir *Richard Rains*, Judge of the Prerogative Court to admit *Richard Watts* to prove the Will of *Edith Pinfold*; Sir *R. Rains* returned, that *Watts* was named Executor, in Trust for three Infant Children of *John Paine* deceased, Brother of *Edith Pinfold*; that it appeared, on Proof made to him, that the said *R. Watts* was very poor, and unable to pay his own Debts; and that he absconded himself; whereby the Infants and other Legatees were in Danger of Losing their Legacies; that in such Case, by the Ecclesiastical Law, the Spiritual Judge may defer to grant Probate till such Executor give Security for Payment of Legacies; and that *Watts* refused to give Security, for which Reason he could not admit him, but deferred Granting the Probate: And after divers Arguments a peremptory *Mandamus* was granted; because the Ecclesiastical Court cannot demand Security; the Testator is the proper Judge of the Qualifications of his Executor: Besides, an Executor has a Temporal Interest, and without Probate cannot sue. The Civil and Canon Law warrant not any such Demand of Security; and tho' there seemed to be some Equity in the Case; yet the Ecclesiastical Court is not the proper Court for Equity here in *England*. Wills are of Ecclesiastical Consuance, but not by Force of the Civil or Canon Law, but as Time out of Mind allowed and received here; and if you enlarge the Power of Ecclesiastical Courts, the King's Courts may restrain you. If a Man make a general Executor, they will sue him to Account in the Spiritual Court, but we will prohibit them; because, by the Law of *England*, the Executor hath all the Goods of the Testa-

Salk. 299.
Ante p. 9.
Carth. 457.
Spiritual Court
cannot refuse
granting Pro-
bate of a Will
to an Execu-
tor, because
indigent or in-
solvent, or
compel him to
give Security.

Vide postea
Hill. 13 W. 3.
Blackbo-
rough v. Da-
vis.

tor not disposed of; and this hath been the Reason of all Prohibitions concerning Administrators on this Account; because by 31 *Ed. 3.* they are put in the same Case with Executors. Now in this Case, suppose an Executor will not give Security, what shall become of this Will, can the Ordinary adjudge him to die Intestate, and grant Administration *cum Testamento annexo*? An Executorship being an Office, it is fit he should take an Oath for the due Execution thereof; but to give a collateral Security, to get other Men to be bound for him, it is against common Right.

A Fine was set on several Defendants, whereas the *Postea* was not return'd; whereupon the next Day, upon Motion, the Rule for setting the Fine was discharged.

Hill and Vaux.

Salk. 656.
Carth. 461.
Modus to pay
Part of the
Thing, if not
in a more Ad-
vantageous
Manner, not
good.

LIBEL in the Spiritual Court of *Lincoln* for Tithes Milk by a Vicar; the Defendant alledged a *Modus*, and prayed a Prohibition; but it appearing on the Suggestion, that by this *Modus*, during that Part of the Year in which the *Modus* was payable, it gave the Vicar no more than a Tenth, which by the Law he ought to have through the whole Year, nor in a more advantageous Way; the Custom was held void, and a Prohibition denied. In the Debate of this Case a Question arose, if it had been a good *Modus*, if it had been alledged that the Delivery had been at the Vicarage-house; which depended on this Question, whether the Parishioner of common Right is obliged to deliver his Milk Tithes either at the Vicarage-house or Church-porch; as was adjudged in the Equity-Side of the Exchequer, in the Case of *Dod* and *Engleton*, *Raym.* 277. And *Holt* said, that a Parishioner is not obliged so to do of common Right, but only to set them out; and that therefore, if this had been in the *Modus*, it would have made it a good one; and that the Case of *Dod* and *Engleton* was a meer equitable Decree, guided by the Custom of the Neighbouring Parishes.

Pool versus Gardner.

Prohibition.
Carth. 463.
Ante p. 132,
135.

ON a Motion for a Prohibition, it was held, that where it doth not appear in the Libel, or Proceedings, that the Conusance doth not belong to the Ecclesiastical Court, there

there no Prohibition shall be granted after Sentence; but where it doth appear in the Libel, or other Proceedings, that the Conusance doth not belong to the Spiritual Court, there, after Sentence, a Prohibition shall be granted in all Cases except one; which is, where a Man is sued out of the Diocese, then if he doth not take Advantage of it before Sentence, he shall not have a Prohibition for that Cause afterwards: Because, tho' the Cause for that Reason does not belong to that Spiritual Court, yet it belongs to a Court of that Nature, and not to one of the King's Courts.

Edward Yard versus Ellard.

ACTION *sur* Case, wherein the Plaintiff declares, that whereas the Defendant 6 Jun' 9 W. 3. was indebted to Plaintiff and *Susannah* his Wife, as Executrix of the Testament of *S. T.* 6 l. for Arrears of Rent due to *S. T.* in his Life-time; and so being indebted, in Consideration the said Plaintiff would give him Time to pay the same till *Mich.* then next following, he promised to pay the said six Pounds to the said Plaintiff, at the Feast of *Mich.* then next following; and shews that he gave him Time till the then next *Mich.* but that the said Defendant has not paid, and avers the Life of his Wife; and on *Non assumpsit* pleaded, and Verdict *pro Quer'*, *Gold* moved in Arrest of Judgment, that this Action should have been brought by the Baron and Feme; because the Debt, which was the Foundation of the Promise, was due to the Wife as Executrix; and the Money, when recovered, would ensue the Nature of the Debt, and be Assets. But the whole Court held the Action was well brought by the Husband only; as in the Case of *Lea and Thinne, Yelv.* 84. and it would have been ill if it had been brought by the Wife, because the Wife was not privy to the Contract; but it is a special Promise made to the Husband only, to whom the Payment is only to be made; and the Recovery on this Promise must be only by him in his own Right; which Promise doth not alter the Debt, because it is not of a higher Nature, but is a Sort of collateral Security; and the Money recovered on this Promise is no Part of the personal Estate of the Testator; for if the Husband dies, his Executor shall have Execution thereof: But yet, when it is recovered, it is a *Devastavit* in the Husband, so far as he recovers.

Salk. 117.
Carth. 462.
A Man indebted to a Feme Covert as Executrix, promises Payment to the Husband, the Husband must bring Action alone.

Savill and Roberts.

Salk. 13.
Cart. 416.
Case lies for
maliciously
causing him
to be indicted
for a Riot, of
which he was
acquitted by
Verdict.

ERROR of a Judgment in an Action *sur Case* in C. B. wherein the Plaintiff *Roberts* declares, that the Defendant maliciously and wickedly intending to oppress the Plaintiff, caused him to be maliciously indicted of a Riot; for that he and divers other Persons did stop a Way, whereby the Defendant used to carry his Tithes, on which Indictment he appeared, and was acquitted; by which Prosecution he was injured in his Name, and put to Expences in defending himself. On Not guilty pleaded, there was a Verdict for the Plaintiff, and 11 *l.* Damages; and Judgment *pro Quer'*; and on this a Writ of Error brought; and the Question is, whether this Action lies for this malicious Prosecution, whereby the Plaintiff was put to Charges and Expences; and C. B. were of Opinion it did. And *Holt* delivered the Opinion of the Court, that Judgment ought to be affirmed, that this Point, which has been often debated, and of which there had been Variety of Opinions, might be settled. In Order whereunto, it is necessary to consider what are the true Grounds and Reasons of such Actions as these; and it doth appear, that there are three Sorts of Damages, any one of which is sufficient to support this Action; 1st, Damage to his Fame, if the Matter whereof he be accused be scandalous. 2^{dly}, To his Person, whereby he is imprisoned. 3^{dly}, To his Property, whereby he is put to Charges and Expences.

The first appears from the Case of *Barns and Constantine*, *Yel.* 46. 2 *Cr.* 32. where it is held, that if an Indictment for Barretry be preferr'd, tho' Indictment be erroneous, or found *Ignoramus*; yet an Action for the Party lies, because it contains Matter of Scandal; and this was the Case of Sir *And. Henly* and Dr. *Burstall*, *Ray.* 180. 1 *Vent.* 23, 25. where an Action *sur Case* was held good for maliciously indicting the Plaintiff being a Justice of Peace, for delivering a Vagrant out of Custody without Examination, contrary to Law; because it contained Matter of Slander.

2^{dly}, If there be Loss of Liberty; this appears from the Stat. 21 *Ed.* 1. 2 *Inst.* 562. *definit' de conspirat'*, where such are defin'd to be Conspirators who cause Children within Age to appeal Men of Felony, whereby they are imprisoned, or sore grieved, &c. and it was thought necessary by Parliament to give the Party Satisfaction for such Sort of Imprisonment.

Imprisonment; wherefore *W. 2. c. 12.* enacts, That the Party acquitted in a malicious Appeal shall have Damages, with Respect had to the Imprisonment of his Body; but neither of these two first Grounds are in this Case; wherefore this Action must be supported by the 'Third, that is, putting him to Charges.

3dly, That a Man put to Answer an Indictment, is put to Charges is notorious; and if so, it is an Injury to his Property; and if this Injury be occasioned by a malicious Prosecution, it is Reason and Justice he should have an Action to repair him the Injury; tho' of late Days it has been questioned, yet it has always been allowed formerly; as the 3 *Ed. 3. 19. 3 Aff. pl. 13. 11 H. 7. 25, 26. F. N. B. 116. Style 378. Atwood and Monger.* But it may be objected, against the Authority of the old Books, that those Actions were grounded on a Conspiracy, which is of an odious Nature; but that without Conspiracy they are not maintainable. To this it is answered, that the Conspiracy was nothing in these Cases, that was not the Ground of these Actions, but the Damage sustained by the Party; for if there were never so great a Conspiracy to indict a Man, yet if nothing be done in Pursuance of that Conspiracy, the Party can have no Action. 9 *Co. Poulter's Case. Jo. 93. Smith v. Cranshaw.* Now if a Man be prosecuted maliciously for a 'Trespas, either with or without a Conspiracy, it is the same Thing, the Trouble and Expence is the same; and I take it, that wheresoever an Action of Conspiracy is maintainable against two, there, if it be a malicious Prosecution by one, Case will lie. These Actions of Conspiracy, in the old Books, ^{1 Cro. 239.} were really but Actions on the Case: But Conspiracy, properly so called, does not lie unless the Party were indicted of a Capital Crime, *F. N. B. 116.* in which Action of Conspiracy, properly so called, if it be brought against two, and the one found guilty, and the other acquitted, no Judgment can be given against him who is found guilty. 11 *H. 7. 25, 26. 2 Inst. 562. 1 Saund. 229.* And no villainous Judgment shall be given, but where a Conspiracy was to take away a Man's Life; and Conspiracy; tho' nothing be done thereupon, is a Crime, and punishable at the Suit of the King. There hath been another Objection, and that is the Opinion of the Judges in the Case of Sir *And. Henly* and Dr. *Burfall*, *Ray. 180.* who, tho' they held the Action lay in the original Case; yet also held, that if a Man be indicted of a Trespas, or other Crime, where there was no

H h h

Slander

Slander, and thereof be acquitted, no such Action as this lies; contrary to 7 H. 4. 31. But that Opinion was not material in the Case before them; there was no Occasion for them to say it. But so far I confess; if in this Case of a Riot, there had been only a Bill preferred, and the Jury had return'd an *Ignoramus*, no Action would have laid; because the Matter is not scandalous: The Party is not imprisoned, neither suffers he any Damage; for if the Jury do not find the Bill, he is not injured; but if he had been imprisoned, the Action would lie, tho' the Bill had not been found; and so in the Case of Scandal. Whereas it hath been objected, that it will be of mischievous Consequence, by stopping all Prosecutions of this Kind; and there is no more Reason in this Case of a malicious Indictment, than a malicious Action; and no Man shall be responsible for any Damages whatsoever for suing a Writ, or prosecuting in the King's Courts.

But it is to be considered, 1st, that there is a great Difference between bringing an Action maliciously, and prosecuting an Indictment maliciously; and 2^{dly}, that Notion, that no Action doth lie for bringing an Action malicious, is not to be taken largely and universally, but with some Restrictions; for 1st, If a Man brings an Action, he either claims a Right, or complains of an Injury; and the Law always allows him to take his Course of Law to obtain his Right, or be satisfied for his Injury; and this is allowed in all Courts. 4 Co. 16. If a Man says to another who is Heir at Law, and as Heir seized of Lands, you are a Bastard, these Words are actionable; but if he says, you are a Bastard, and I am Heir to the Estate, the Addition of these later Words, tho' false, make them not actionable, because he claims a Right. The Law hath provided, that no Man should prosecute without finding Pledges; and that was a Security against troublesome Actions; then if the Plaintiff's Suit be vexatious and groundless, he shall be amerced *pro falso clamore*; and tho' these Amerciaments be now Matters of Form, and therefore several Acts of Parliament have given Costs to Defendants, yet we must judge by the Reason of the Law, as it stood antiently; but in Case of an Indictment, there is no Provision or Remedy, but by bringing an Action; but if it appears that the Action is brought meerly for Vexation and Oppression, the Party grieved in some Cases shall have Action *sur Case*; he shall not indeed say generally, that he falsely and maliciously, without probable Cause, did bring an Action, &c. but

Vide 1 Saund.
132.
Vide 1 Sid.
463.

1 Vent. 86;
87.

but if he shew any special Matter, whereby it appears to the Court that it was frivolous and vexatious, he shall have an Action; as in the Case of *Daw and Swaine*, 1 Sid. 424. 1 Saund. 228. *Skinner and Gunton*. There is another Case where an Action of this Nature will lie, and that is, where a Stranger, who is not at all concerned, will excite another to bring an Action, whereby he is grieved, Action lies against the Exciter. There are other Cases where this Action is allowed; as 1 Cr. 291. *Carlion and Mills*; 2 Mod. *Norris and Palmer*; 1 Rol. Ab. *Ruddock and Sherman*; but tho' this Action doth lie, yet it is an Action not to be favoured, and ought not to be maintained, *without rank* and exprefs Malice and Iniquity: Therefore, if there be no Scandal or Imprisonment, and *Ignoramus* found, no Action lies, tho' the Matter be false; yet if the Indictment be fairly prosecuted, no Action lies: So if the Court has a Jurisdiction, tho' the Matter be scandalous; yet if there be no Malice, no Action lies. But in the Case before us the Verdict has found exprefs Malice; and therefore Judgment ought to be affirmed.

If Notice in Ejectment be given to an Under-tenant, and he doth not acquaint his Landlord therewith, but suffers Judgment to go against him, the Court, upon Motion, will not suffer Execution to be taken out, till the Right be tried.

Martin versus Gell.

CASE, by Bill for Goods sold, against *Francis Gell Esq*; who pleaded, that he was not *F. Gell Esq*; but Merchant; whereon the Plaintiff demurred; and Judgment to answer over; because the Statute of Additions extends only to Process where Outlawry lies, and no Outlawry lies on a Bill.

Statute of Additions extends only to Process on which Outlawry lies.

Jackson versus Pigot.

Assumpsit on a Bill of Exchange against the Acceptor; wherein the Plaintiff declares, that one *Dunkin* of Bristol, the 25th of March 1696. drew a Bill of Exchange

Bill of Exchange.
Salk. 127.
Carth. 459.
A. the Day of

Payment of a Bill of Exchange being past, promised to pay *secundum tenorem*; &c. good; for it shall be paid presently. Postea Trin. 12 W. 3. *Mitford versus Walcot &c.*

on the Defendant, payable to the Plaintiff within a Month; that 16th of *May* 1697. the Defendant accepted the Bill, and promised to pay *secundum tenorem & effectum Billæ*; on *Non assumpsit* pleaded, and Verdict *pro Quer'*, it was moved in Arrest of Judgment, that the *Assumpsit* was impossible, because made a Year after the Time of Payment of the Bill to pay the Money according to the Bill. But Judgment was given for the Plaintiff; for it appearing on the Declaration, that the Acceptance of the Bill was after the Day of Payment, the *secundum tenorem & effectum* must be understood to pay the Bill presently; but if it had appeared on the Declaration, that the Acceptance was before the Day of Payment by the Bill, there, upon the Evidence, an Acceptance after would not have maintain'd the Action.

The King versus Inhabitants of St. Leonard Shore-ditch.

Carth. 464.
Salk. 483,

524.
Sessions may
set aside a
Poor's Rate,
and make a
new one them-
selves, or or-
der one to be
made by the
Church-war-
dens, &c.

THE Church-wardens and Overseers, and some of the Inhabitants of this Parish, made a Poor's Rate, which was confirmed by two Justices; in which several were not taxed for their personal Estates, (which was erroneous,) but the whole lay on the real Estates of the Parish; on which several of the Inhabitants appeal'd to the Sessions; and they ordered, that the said Rate should be annulled, and a new one made; accordingly the Church-wardens made a new Rate, both on the real and personal Estates; which Rate was confirmed by the two Justices. But in the new Rate there was a great Inequality, the Real Estates being rated in Proportion ten Times more than the Personal; for which several of the Inhabitants appeal'd again to the Sessions, where another Order was made to discharge the said Rate. And now these two Orders of Sessions being removed by *Certiorari* into this Court, it was moved to quash them; because the Sessions can only relieve particular Persons grieved by the Rate, and cannot set aside the whole Rate. *Sed per totam Cur'*, Sure the Justices at Sessions, upon an Appeal by particular Persons grieved, may, if they see Reason, set aside the whole Rate; for the Act is, that if any *Person or Persons* find themselves aggrieved, it shall be lawful for the Justices of the Peace, at their General Quarter-Sessions, to take such Order therein as to them shall be thought convenient; and the same to conclude and bind all the said Parties. 43 *El.*

c. 2. p. 6. So that the Justices have a large Power; and in both these Cases, either on the first Rate, where the personal Estates were not charged, or upon the second, where they are unequally charged, it is impossible for them to give Relief, without setting aside the whole Rate; which therefore they may legally do, being impowered by the Act to take Order herein according to their Discretion; by Virtue of which, as they may set aside the whole Rate, so they may make a new Rate themselves, or order the Overseers, &c. and Church-wardens to make a new one, as was done in this Case; wherefore these two Orders were confirmed.

Loveridge and Whitrow.

IN this Case it was ruled, that if *A.* brings Debt in *London* Attachment in *London* against *B.* and attach Goods of *B.* in the Hands of *C.* from whose Possession the Goods are not removed; and *B.* by *Certiorari* brings the Cause into the *K. B.* and puts in Bail, the Attachment is at an End, and *C.* ought to deliver the Goods to *B.* which if he does not do, *B.* may have Trover or Replevin; but the *K. B.* will not compel him to deliver them, because he is no Party in Court; and all Things now are as if there never had been an Attachment.

Hawkins versus Gardner.

CASE on a Bill of Exchange; whereby the Defendant Salk. 65. promised to pay to *R. A.* or Order, 460 *l.* who indor- Carth. 466. fed 44 *l.* thereof to the Plaintiff; who as Indorsee brought Part of a Bill of Exchange cannot be assigned, so as to intitle the Indorsee to an Action. Ante p. 72, 84. this Action for the said 44 *l.* Part of the said 460 *l.* Defendant pleaded an insufficient Plea, and the Plaintiff demurred; and it was held that this personal Contract is intire, and cannot be apportioned and multiplied into several Actions: So that if *A.* draws a Bill of 100 *l.* payable to *B.* or Order; *B.* cannot assign 50 *l.* thereof, so as his Assignee shall have an Action for the same; and if *B.* himself bring an Action for Part, he must acknowledge Satisfaction for the Residue.

Luck versus Goodwin.

SCI fac', Exception was taken, that whereas it was said *Petit judicium pro misis & custagiis in hac parte*, that it should have been *in ea parte*; but *in hac parte* was held good.

Harrison versus Cage & Ux'.

Salk. 24.
Carth. 467.
5 Mod. 411.
Assumpsit by a
Man against
a Woman, in
Consideration
that he had
promised to
marry her, she
promised to
marry him.
3 Lev. 64.

Ante p. 97,
101, 121.

ACTION *sur* Case, for that in Consideration he promised to marry the Wife *dum sola*, she promised to marry him; that he frequently offered himself to her to marry her, but that she had not married him, but married the Defendant; on Not guilty, and Verdict *pro Quer'*, it was moved in Arrest of Judgment, that there was no Consideration; for tho' an Action will lie for a Woman against a Man for Non-performance of his Promise to marry her; yet such an Action will not lie for a Man against a Woman. *Sed tota Cur' contra*; because if the Woman's Promise did not bind her, neither could the Man's bind him; because otherwise there would be no Consideration for the Man's Promise; and a Promise without a Consideration is void; but where there is a Promise against a Promise, one Promise is the Consideration of the other, because each may have his Action against the other for Non-performance; whereupon the Plaintiff had Judgment. And in this Case *Holt* held, that if a Man making such a Promise were incapable to perform by Reason of Consanguinity, &c. it would be there a void Promise, whereof she might discharge herself, by giving special Matter in Evidence on *Non assumpsit*.

Moer versus The Manucaptors of Garrett.

Salk. 556.
On pleading
Nul tiel Record', Day is
given to bring
it in.

SCI fac' versus Bail, who pleaded, that there was no *Capias* against the Principal; Plaintiff replied, and set out a *Capias prout patet per Recordum*; the Defendant rejoined *Nul tiel Record'*; Plaintiff surrejoined, that there was such a Record, and prayed a Day to bring it in; whereupon the Defendant demurred. *Per Holt*: This Way of Pleading is out of the common Course; there are two

Ways of Pleading of a Record, either by craving Oyer of the Record, and if it is not given it is a Failure; or he may plead *Nul tiel record*, and then a Day is given to bring it in; but this Surrejoinder is a third Way, and a new one; but it was adjudged well enough, and Plaintiff had Judgment.

Poslea Hill.
11 W. 3.
Grant v. Bur-
ton, acc.
Pasch. 12
W. 3. Cream-
er v. Wickett,
cont.

Goodwin versus Beakbane.

IT was adjudged in this Case, that in a *Sci' fac'* it is sufficient that there be fifteen Days inclusive between the *Teste* of the Writ of the first *Sci' fac'* and the Return of the second.

Roswell and Prior.

ACTION *sur* Case, wherein the Plaintiff declared, that he was possessed of a certain House for a Term of Years yet to come; wherein were twenty-one Windows, whereby the Light *inferri consuevit & debuit* into the House; that the Defendant erected a Building near the said House, whereby the Light was obstructed; Verdict *pro Quer'*; and moved in Arrest of Judgment, that there was no Prescription made to the Light; and it was not so much as said, that it was *antiquum Messuagium*. But *per Cur'*, being after Verdict, the Declaration is good, it must be intended that the Plaintiff was put to prove it to be an antient House; and unless it had been an antient House and Light, the Jury could not have found for the Plaintiff; on a Demurrer this short Way of Pleading had not been good.

Per Holt: The Filing a Writ of *Habeas Corpus* is not an Appearance, but a *Procedendo* may go notwithstanding; but if Bail, either common or special, be put in, then no *Procedendo* to go.

Filing a *Ha-
beas Corpus* is
no Appear-
ance.

At Guild-hall *coram* Holt.

Dupays versus Shepherd.

CASE on a Wager concerning the Day of the Conclusion of the Peace; and to prove it to be on the tenth Day of September the printed Proclamation printed Act, good Evidence, tho' not compared with the Record.

Vide Sal. 566.
Evidence.
Printed Pro-
clamation, or
the Record.

was

was produced; and it was objected, that it ought not to be given in Evidence, unless it had been examined by the Record inrolled in Chancery, or proved to have been under the Great Seal. But *per Holt* it was held good notwithstanding; and that such Things as these in Print, as are of as publick Nature as a publick Act of Parliament, and that even a private Act of Parliament in Print, that concerns a whole County, as the Act of *Bedford-Levels*, may be given in Evidence without comparing it with the Record.

463.
Vide postea
Trin. 12 W. 3.
Domina Regina v. Inhabitants de Glamorganshire.

Winckesline versus *Ebden*, Mich. 8. Rot. 45.

Goods of a Ship may be distrained for the Port-Duties of Goods shipp'd on Board it.

TROVER for an Anchor, Sails and Cables; on Not guilty, a special Verdict found, that the Vill of *Newcastle* is an antient Vill, and incorporate Time out of Mind, known by the Name of Mayor and Burgeses of *Newcastle*; and that within the Vill there had been a Custom, Time out of Mind, for the Mayor and Burgeses from Time to Time to repair the Port of the Vill; and that in Consideration thereof, they have used to have a Toll of 5 d. per Chaldron of all Coals exported; and that for Default of Payment they have used, by their Water-Bailiffs for the Time being, to distrain *quacunque bona* of the Exporter who refused to pay the Toll, *quæ per legem terræ fuerunt distringibilia*; then they find that the Defendant was Water-Bailiff, constituted *debito modo* by the Mayor and Burgeses; and that the Plaintiff loaded so many Chaldron of Coals, the Duty whereof amounted to 7 l. that Exporter refused to pay it, and therefore the said Anchor, Sails and Cables, being Part of the Tackle of the said Ship of the Plaintiff, the Defendant took them as Distress for the Toll, &c. And if these Goods are *in tali casu per legem terræ distringibilia*, they find for the Defendant; if not, for Plaintiff.

And Judgment was given for the Defendant; tho' it was objected, that the Prescription here is for taking Goods of one Man for the Offence of another; for it is to take the Goods of the Exporter, which is the Owner, and not the Master of the Ship; but here the Goods are taken from the Master, and therefore ill. *Sed per Holt*, tho' to speak properly, in the Way of Trade, the Owner of the Goods was the Exporter; yet as to the Duties of the Port, the Master of the Ship is the Exporter, and satisfies and discharges all such Duties; for it would be very unreasonable to force the Mayor and Burgeses to go and find out the Merchant

Merchant that is the Owner; and the constant Usage is very reasonable; for without Ports there would be no Navigation, and without Port-Duties they could not be repaired; the Duty is to be paid by the Trader, who is to reap the Benefit of the Port: And tho' it is true, that a Horse cannot be distrained for Rent in a Smith's Shop; yet there is no such Restriction where the Distress is for personal Duties. The Duty in this Case arises out of the Goods laden to be exported; and by their being laden the Duty commences, and the Ship becomes chargeable, and *a fortiori* any Part of it; without Doubt any other Goods of the Person who ought to pay the Duty may be distrained, as well as those for which the Duty is payable; *ideo Jud' pro Quer'.*

Barnes versus Geering.

Barnes an Attorney of the Court brought Debt against the Defendant, but did not deliver a Declaration against the Defendant till after the second Term; but sometime after, and before the Defendant had signed a *Non prof.* he delivered him a Declaration, which the Defendant refused to receive, and then signed his *Non prof.* and Plaintiff signed Judgment for Want of a Plea, which was now set aside as irregular; for the Course of the Court is, that if a Declaration be not delivered by the last Day of the second Term, that is on or before it, sitting the Court the last Day, the Defendant may sign a *Non prof.* and if in such Case he does not immediately sign a *Non prof.* tho' he may after receive a Declaration, if he will, yet he is not compellable so to do; but he may well refuse it; by an express Clause in the Statute of *H. 8.* there shall be no Costs against an Attorney upon Nonsuit.

If Declaration is not delivered by the last Day of the second Term, Defendant may sign a *Non prof.* and is not obliged to receive a Declaration.

Robert versus John Villars, alias Danvers.

Fielding arrested the Defendant in *Ass.* and *Trover*; who now moved that he might answer without putting in Bail, because he was a Peer, *viz.* Earl of *Buckingham*, Viscount *Purbeck*, and Baron of *Stoke*, and so was free from Arrest; that if he should put in Bail, it must be by the Name whereby he is arrested, which would estop him from claiming his Peerage. *Sed per Cur'*, in all Civil Cases the Bail only enter into the Recognizance, and not the

In Civil Actions, the Recognizance is entered into by the Bail only, and is no Estoppel.

Party himself; and therefore it would be no Estoppel to him; that they could not take Notice of his Peerage, otherwise than by Plea, which could not be till he was in the Custody of the Marshal; and therefore being by Coercion, it would not prejudice him: So Court would order nothing, *sed currat lex*; but *Holt* said, if this had been a Criminal Case, they would dispence with his Joining in the Recognizance, to save the Estoppel; and that in this they would make the Plaintiff declare speedily, and not be allowed the usual Time.

King versus Beere.

Salk. 417.
Carth. 407.
Libel.
Juxta tenorem
signifies the
Words them-
selves. Wri-
ting a Libel is
making one.

Vide 1 Sid.
219.

Indictment against him, for that he, designing to subvert the Government, did compose, make, write, collect, and had in his Custody, with an Intent to publish, several false and scandalous Libels against the King, in one of which *continetur inter alia juxta tenorem & ad effectum sequentem*, setting out the Words themselves: On Not guilty the Jury find, that *quoad scriptionem & collectionem tantum separatum libellorum in Indictamento mentionat suis inde culpabilis prout in Indictamento supponitur*; and as to all other Things mentioned in the Indictment Not guilty; and after several Exceptions in Arrest of Judgment, the Court delivered their Opinions *seriatim*, that the Indictment was sufficient; and that there was a sufficient Crime found in the Verdict to charge the Defendant. *Holt*: The Objection to the Indictment is, that the Charge is not certain, but only *juxta tenorem & ad effectum sequentem*; supposing it had been *ad Effectum* only, I should have been of Opinion, that it had been too uncertain; but *juxta tenorem* renders it certain enough; *Juxta*, as a Preposition, signifies the same as *Secundum* in the Civil Law; and so it does in the Common Law, as *juxta formam statuti*. So in *Chapman* and *Dalton's Case*, *Plowd.* 285. *b.* *Co. Ent.* 116. *a.* Then suppose *secundum tenorem* were the Words, *tenor* signifies the very Words, as *cujus tenor sequitur in hac verba*. In Debt on a Bond in the *Register* 169. *b.* in *Certiorari* to remove the Transcript of a Record or Fine, the King signifies that he is willing to be certified *super tenorem finis*, which proves *transcriptum* and *tenorem* to be the same; so that *Juxta ten'* does here signify the very same Words themselves, or an exact Transcript of the very Words; and if on the Trial, the Words in the Libel had not been exactly the

the same with the Words in the Indictment, the Defendant could not have been found guilty; then if *juxta tenorem* be certain enough, *ad effectum* cannot make them uncertain, for *utile per inutile non vitiatur*. This indeed is not the antient formal Way, but introduced of late Years; and the first Time it was ever debated was in the Case of *Ford and Bennet*, in this Court, *Hill. 34 & 35 Ca. 2. Rot. 1154.* which was a special Action on the Case, for preferring a scandalous Petition against him to King *Ch. 2. ad tenorem & effectum sequentem*; and ruled on Debate to be certain enough; and the same affirmed afterwards in the Exchequer Chamber; and since that there have been several Precedents to the same Purpose; as the *King and Fuller, Mich. 4 W. & M. n. 42.*

Before I come to the Objections against the Verdict, I shall consider whether it be not criminal to write a Libel, tho' a Man be not the Composer or Contriver thereof; and certainly it is a great and heinous Offence: A Libel consists not in Words and scandalous Matter only, for that is not of it self sufficient, tho' spoken with never so much Malice; but it is the Putting in Writing, or Procuring to be put in Writing; for if the Words are not written, he is not guilty of the Libel. A Libel, as such, is a specifick Offence; and it is the Writing libellous Words and Sentences, that makes the Offence; and in all Cases, where a Man does an Act, which Act causes the Thing to be what it is, such a one is to be considered and construed the Doer of it; and this Rule holds as well in great Offences as in small. If *A.* contrives treasonable Matter, and dictates it to *B.* and *B.* writes it, it is Treason in *B.* as well as in *A.* If an Act of Parliament makes a Felony, as in Case of Rape or Sodomy, and says nothing of Abettors, if *B.* accompanies *A.* while he does the Fact, and guards the Door, *B.* is guilty of Felony as well as *A.* tho' the Statute speaks of the Principals only. *3 Inst. 59.* So in all lower Offences Procurers are Principals; as if *A.* holds *B.* while *C.* beats him, *A.* is guilty of the Battery; and it would be very strange, if in this Case only, he which contributes as much to the Doing of a Thing, as he that did it, should be innocent. And whereas *Lamb's Case* in *9 Co. 59. b.* hath been objected; that Case must be expounded by the Report of the same Case in *Moor 813.* where it is reported to have been resolved, that the Writer of a Libel is in Judgment of Law the Contriver; and then *Coke's Case*, that he that is convict of a Libel must be Contriver, Procurer or Publisher, is good Law, but otherwise not. But
taking

taking it in its restrain'd Sense, it will not affect this Case for the Question was not concerning the Writing or Making the Libel, but about the Publication thereof; and they held, that the Writing the Copy of a Libel, as indeed writing the original Libel it self, is no Publication thereof, but only an Evidence of a Publication; the Question there being, not how far the Writing the Copy of a Libel is criminal, but whether the Writing a Copy be a Publication, which indeed it is not; if there has been a Publication of it proved, it is Evidence that it was by him that had it in his Custody.

It hath further been objected, that there may be a lawful Copy of a Libel; as a Man may write out a Copy of a Libel to carry it to a Magistrate; a Student may take a Copy of it at the Bar for his Instructions; all these Things I own may be lawfully done; but then, where a Thing abstractedly is unlawful in it self, there must be some other Matter to legitimate it, which otherwise would be unlawful; and that must appear to the Court upon Evidence, and then the Party will not be convicted; besides, if a Man lawfully take a Copy of a Libel in a lawful Manner, that is no Libel, because it is not *ad Infamiam* of the Party concern'd, which every Libel is. 3 *In.* 174. is an apposite Case; there *John de Northampton* is charged with Writing only, and not any Mention made of Publication, and Writing only is confessed; but the Court were very tender in their Punishment, in Regard he was an Attorney. I need not go so far in this Case as to give any Opinion, whether the Writing a Copy be a Libel or no; for supposing it be not, then it could not have been given in Evidence against the Defendant, for he is found guilty of Writing a Libel; that is a Conviction of Writing an original one, if a Copy be not a Libel. But indeed I think, that the Taking the Copy of a Libel is a Libel; because it comprehends all that is necessary to the Making of a Libel; it hath the same scandalous Matter in it, and the same mischievous Consequences attending it at first; for it is by this Means perpetuated, and it may come into the Hands of other Men, and be published after the Death of the Copyer; and if Men might take Copies with Impunity, by the same Reason Printing of them would be no Offence; and then farewell to all Government.

Vide tamen
1 Vent. 31.

The Defendant has had great Favour in this Verdict; for when a Libel is produced, written with the proper Hand of a Man, and the Author of it is not known, this puts the

Proof

Proof on him; and if he can't produce the Composer, the Verdict shall be against him, and shall be as bad as taking one in Possession of a Horse that is stolen.

As to the second Objection against the Verdict, that this amounts to an Acquittal, because the Defendant being charged with the composing, writing and making; and being found not guilty of the making and composing, he is also found not guilty of the writing, or otherwise the Verdict is repugnant and void: As to this it may be answered, that writing is a making, but it is but one sort of making; making is the *Genus* and contriving, composing and writing are the *Species* of it; then the finding not guilty of all but the writing finds him not guilty of any Species of Libel but writing; and this Notion of Libel is as old as the Law. Libelling a private Man is a moral Offence, but when it is against the Government it tends to the Destruction of it; so it is in the Civil Law, *Just. Inst. lib. 4. tit. 4. de injuriis*; and I cite this Authority because *Bracton, lib. 3. c. 36. f. 155.* seems to have transcribed this Sentence from *Justinian*, and therefore Judgment ought to be for the King. *Turton* and *Rokeby* were of the same Opinion as to the several Points relating to the Indictment and Verdict, and cited some Cases to prove that the writing a Libel without publishing it was punishable in the Star-Chamber, *Hob. 62, 215, 121. Pop. 139. 12 Co. 35.* And after Defendant was fin'd 500 Marks, and order'd to appear at the Sessions at *Exeter*, and to make Submission in a Form of Words to be prescribed him; but the last Day of the Term his Fine was remitted to 100 Marks.

Clayton versus Kynaston.

Clayton Executor of *William Wintershall* brought Covenant against *Edward Kynaston*, and the Plaintiff declared on Articles of Agreement, 10 May 1676, between *Killigrew Kynaston* and others the King's Players on one Part, and *Wintershall* on the other; wherein it was jointly and severally agreed, that if the said *Wil. Wintershall* should be minded to leave off Acting, and give Notice thereof in Writing, &c. that he should have 5 s. allow'd him every acting Day, &c. And if the said *William Wintershall* should happen to die before such Notice in Writing, that then 100 l. should be paid to his Executor within six Months after his Death, provided that such Notice should not be given but in an acting Week. Plaintiff assigns for Breach, that *Wintershall*

Sal. 573.
Two Deeds
made at the
same Time
not having re-
ference to each
other, not to
be construed
Defeazances.

after the making of the Indenture aforesaid died at *London*, 7 *July* 1679, and that the 100 *l.* was not paid within the six Months after his Death. Defendant pleaded, that at the 'Time of' making of the aforesaid Indenture, another Indenture was made between the said *Wintershall* and *Thomas Killigrew* on the one Part, and *Edward Kynaston* on the other Part; whereby it was jointly and severally agreed, that if, &c. (setting out *verbatim* the same Covenants and Agreements as in the former Indentures) the said *Kynaston* should have a Mind to leave off Acting, he should be discharged from all Debts, Sums of Money, Contracts and Promises for the Use of the Society, or concerning the same, &c. And then he saith that two Years before the Death of *William Wintershall* he gave Notice, according to the Covenant, of his Intention to leave off Acting, and accordingly two Years before *Wintershall's* Death left off acting, whereby he became discharged from the said Covenant, and from paying the 100 *l.* and prays Judgment: And thereon the Plaintiff demurr'd; and *Holt* deliver'd the Judgment of the Court, that the Deed pleaded by the Defendant was no Defeasance of the Deed declared on by the Plaintiff, because both the Deeds were made at one and the same Time. It can never be the Intention of the Parties that they should defeat each other, and one Deed has no Reference to the other, as is in all those Cases that have been construed to be Defeasances; for if *Kynaston* by desisting shall be discharged of his Covenant, *Wintershall's* Security wou'd be very much diminished, if not totally destroyed, and it may be the several Remedy is also: For where two are jointly and severally bound in a Bond, Release to one discharges the other; but he said he would not give any Opinion what the Law would be in such Case, in the Case of Covenant; but that the joint Remedy is destroyed is without doubt; and certainly it could never be the Intent of the Parties that the Deed should be void as soon as it was made. But if *A.* be obliged to *B.* and then *B.* reciting the Obligation covenants to save him harmless absolutely or upon Contingency, this amounts to an absolute Defeasance in one Case, and after the Contingency happens in the other Case, to prevent Circuity of Action; but here is no Relation between the two Deeds, and the Words of the Covenant are to be discharged and saved harmless absolutely, or upon a Contingency, &c. before made, or afterwards to be made; but no Mention is made of Security given at the same Time; besides that, the Intent of the Parties was that they should be mutual Securities; and therefore one Deed

Deed could not be a Defeasance of the other; and Judgment,
pro Quer.

King versus Gall.

H*OLT* deliver'd the Opinion of ten of the Judges, who met at *Serjeants Inn* upon some Questions *sur Stat.* 21 *Jac. c. 4.* 1. That that Statute does not extend to any Offence newly created by any Statute made since; so that subsequent penal Statutes are not restrained thereby. 2. That no Action of Debt lies on the Statute of 5 *El. c. 4.* or any penal Statute by a common Informer in a foreign County, but is taken away by the Statute of 21 *Jac.* but if the Fact was committed in the County where the *K. B.* sits, then it may be brought in the *K. Bench*, but not otherwise, and denied the Case of *Barnes and Hughs*, 1 *Sid.* 400, 1 *Vent.* 8. to be Law.

And *per Holt*, *Rookby* and *Turton*, if a subsequent Act be made that gives a popular Action, you must in Debt lay it in the proper County; and tho' the Party go out of the County, you may proceed against him by Outlawry.

All popular Actions and Prosecutions on penal Statutes before 21 *Jac.* must be in the County where the Fact was committed.
Note; Mich. 2 *An.* a Judgment was in common Pleas pursuant to this Resolution, upon 5 *El.* Vide ante 31 *acc.*
Hob. 327. *acc.*
Sal. 373.
Carth. 465.
3 *Lev.* 71
con.

Heylin versus Hastings.

I*Ndebitatus assumpsit* by an Executor for Goods and Wares sold and delivered by his Testator. Defendant pleads *non assumpsit infra sex Annos*, and the Proof on the Trial was, that the Goods were sold and delivered above six Years before the Action brought, *viz.* *Anno* 1686, after which the Plaintiff's Testator died; and *Anno* 1695, the Plaintiff deliver'd the Defendant a Bill of the said Goods. The Defendant denied that he had them; but said prove it, and I will pay you; and now on this Trial the Plaintiff proved that the Defendant had the Goods; and the Question was, whether this might be given in Evidence on this general Declaration, and whether this Promise brought the Party out of the Statute of Limitation; whereof a Case being made and Advice had thereon, all the Judges at *Serjeants Inn*, except *Lechmere*, as *Holt* declared, were of Opinion that this special Promise of the Defendant amounted to a Waiver of the Statute of Limitations, and that this Matter might well be given in Evidence on this general Declaration: And that Proof of the Delivery of the Goods was to be made on the Trial in this Action,

Sal. 29.
5 *Mod.* 425.
Carth. 470.

Action, it being no more than if he had said (if I had the Goods I will pay for them). *Holt* likewise declared, that all the Judges were of Opinion, that a bare Acknowledgment of the Debt does not amount to a new Promise, but is Evidence of a new Promise; which *Rookby* compared to the Case of Trover and Conversion, where Demand and Refusal is Evidence of a Conversion, but not a Conversion itself.

King versus Duncomb.

Jury can't be struck by the Master in Capital Cases.

THE Attorney General moved for Leave to amend an Information against *Duncomb*, wherein the Name of a Commissioner of Excise was mistaken; and granted: And that the Master might strike a Jury by Consent, which was also granted, being only a Case of Misdemeanor; but not in capital Cases, for then the Prisoner would lose his Challenges; and it was never ask'd to replead upon mending Information: In Case of Misdemeanor the Coroner returns forty eight, but not in capital Cases.

Bridget Baily's Case.

Service for one entire Year tho' by different Contract, is a good Service for a Year.

BRIDGET Baily, before the 25th of March 1695, was settled Inhabitant in the Parish of *Overton* in *Hampshire*; and then about the said 25th of March she contracted with *John Orpwood* of *Steventon* for 20 s. to serve him from the said 25th of March to *Michaelmas* following, which she accordingly did; and then she made a new Contract with him to serve him for a longer Time, by Virtue of which she served him for a longer Time, from *Michaelmas* till *April* following; and it was held that tho' there was not an entire Contract for a Twelvemonth, yet there being a Service for a Twelvemonth it gained her a Settlement, according to the 9th W. 3. c. 30.

Anonymus.

Judgment on Information in nature of a *Quo warranto* is only final if against the Defendant.

IT was moved for Leave to file an Information against the Mayor and Common Council of *Hertford* in the Name of *Sir Samuel Aftree*, to know by what Warrant they admitted Foreigners and Strangers to the Freedom of the Town,

Town, alledging that this was no *Quo warranto* in the Name or at the Prosecution of the King, but only a Method to try a Right, whether the Mayor and Common Council could, contrary to the exprefs Words of the Charter, as it appear'd, admit those to the Freedom of the Town who were Strangers, and not Inhabitants therein, and produced four or five Precedents in the Time of King *Charles I.* and after several Motions the Court gave Leave to file an Information, because the injur'd Freemen of the Town could have no other way to remedy themselves, or to try their Right. In this Case *Holt* said that a *Quo warranto* was in the Nature of a Writ of Right, to which the Defendant can have no Plea but to justify or disclaim, and can't plead Not guilty; and that Judgment both for and against the King is final. But the Judgment in an Information in Nature of *Quo warranto*, if against the Defendant, is final, but not if against the King; and that in this Case the Right is in the Corporation, and the Execution only in the Mayor and Aldermen. *V. 1 Sid. 86. 9 Co. 28. a. 2 In. 282.*

Coot versus Lynch.

Judgment was given for the Plaintiff in *Ireland*, and Costs were taxed, and Error was brought in the *King's Bench* here, and Judgment affirm'd, and Costs tax'd; and after Error brought in Parliament here, and Judgment affirm'd, and *Capias* sued against the Defendant for all the Costs given here; and after several Arguments and Consideration of the Court Execution was set aside; for it was said *per Holt* that in this Case one could not have *Capias* in any County of *England*, because the Cause of Action arises in *Ireland*, and there the *Venue* is laid, and therefore the original *Capias* ought to issue in *Ireland*, but no *Capias* could issue out of the *K. B.* in *Ireland*, and *ideo* not here; neither an original *Capias*, nor *Test*; but the Method is to issue out a Writ reciting all the Proceedings here, directed to the *C. J.* of the *K. B.* in *Ireland*, and there Execution shall be sued out for all, (for tho' the Judgment be affirmed here, yet the Law supposes the Party commorant in *Ireland*;) for the Costs are but accessory to the Judgment; and such Mandatory Writ determines the Writ of Error here, and restores the Cause in *Ireland*: And it was also said *per Holt*, that it is the true Record which comes here out of *Ireland*, and not the Transcript, but when it comes here it is the true Record, and not

Sal. 321.
Carth. 460.
5 Mod. 421.
on the Judgment affirm'd in *B. R.* on Writ of Error out of *Ireland*, Execution must be by Writ in *Ireland*.

Post Mich.
11 W. 3.
Dillon v.
Walcott.
Cro. Ca. 512.
Bp. Oflory
contra.

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before,

before, and that which is in *Ireland* ceases to be a Record. And so it is of a Record of *C. B.* that comes hither by Writ of Error.

King versus Fell Keeper of Newgate.

Salk. 272.
5 Mod 414.
Indictment for
Escape of a
Person in his
Custody *pro*
alta proditiōe,
ill, not saying
he was com-
mitted for it.

Ante 75. acc.

Ante 75.
contra.

FELL was indicted for the Escape of *Berkenhead*, who was committed for High Treason in conspiring the Death of the King: Upon Not guilty pleaded, and Verdict against the Defendant, it was moved in Arrest of Judgment, that the Indictment was only that *Fell* suffer'd *B.* to escape, being in his Custody *pro alta proditiōe prædict.* and did not shew he was committed for High Treason to the Custody of the Defendant; and for this Exception Judgment was arrested, for it was said by *Holt* that he might be in Custody for Debt, Riot, &c. and another might go before a Secretary of State or Justice of Peace, and swear High Treason against him, in that Case he is in Custody of *Fell* charged with High Treason; but because he was not committed to *F.* for High Treason, he shall not answer for his Escape as for the Escape of one committed for High Treason; the Precedents are *cujus ex causâ commissus fuit.* Another Objection was, that it was said that *B.* was committed *Prisonæ de Newgate sub Custodia Vic.* whereby it did not appear that he was committed to the Custody of *F.* and that to say he was committed *Prisonæ* was insensible, for he cannot be committed to a Place but to a Person, &c. As to the first Part of the Objection it was held well enough; for if *B.* be committed to the Sheriff, and the Gaoler lets him escape, the Gaoler is liable; and tho' some Doubt has been made whether the Sheriff be liable in such Case, yet *per Holt* without doubt he is, for by the 14 *Ed. 3. c. 10.* the Sheriff is to put in such Keepers for whom he will answer; and the 19 *H. 7. c. 10.* which restores the Gaols to the Sheriff, says that he shall be answerable for the Escapes where the Gaol belongs to him. As to the other Part of the Objection, *Holt* said that *commissus fuit Prisonæ*, or *Turri London*, was good; and so were the Precedents. But for the first Objection Judgment was arrested.

King versus Fell.

ANother Indictment was against him for the Escape of *Wray* convicted of a Misdemeanor for attempting to counterfeit Chequer Bills; and after Judgment that he should stand in the Pillory, the Sheriff out of Favour delay'd the Execution beyond the usual Time, and in that Time *Wray* escaped; and on the Indictment *Fell* being found guilty was now in Court to be fin'd. *Holt*: In this Case the Sheriff ought to be prosecuted and fined grievously, for the Judgment ought to be executed in convenient Time, and the Sheriff's respiting it is an Affront to the Justice of the Nation; but however that is no Excuse to *Fell*. If here *Fell* had retaken the Malefactor before an Indictment found against him for the Escape, he ought not after to be troubled for the Escape; and he was fin'd 40 Marks.

If a Person convicted of a Misdemeanor escapes, and is retaken before the Gaoler is indicted for it, he shall not be troubled for the Escape.

Vide 3 Co. 52b. *Simile*.

Ward versus Everard. Hill. 7 W. 3. rot. 718.

IN Replevin the Defendant avow'd as Bailiff to *Carina* and *Elizabeth Cromwell*, for that Sir *Robert Carr* was seized in Fee of the Place where, &c. and being so seiz'd, granted an Annuity or Annual Rent of 100*l.* to *Carina*, *Elizabeth*, *Anne*, *Mary* and *Esther Cromwell*, during their Lives, and the Life of the Survivor, to be equally divided between them, viz. 20*l.* for each of them during their Lives, and after the Death of the first of them, that her Part should be equally divided among the Survivors; and then follows the same Limitation, if the second and third die; but when it comes to the two last there is no Limitation of the Survivorship between them. That *Car.* and *El.* were the two Survivors, and for Rent Arrear, as Bailiff to them, the Defendant avows, &c. and the Plaintiff in Bar of the Avowry pleads, that by an Act of Parliament all Conveyances made by Sir *R. Carr*, made before April 1630, were made void; and that this Conveyance was such, and upon Issue join'd Verdict was for the Avowant: And it was moved in Arrest of Judgment, that the Avowry was ill, because by the Grant the Grantees were Tenants in common of this Rent, and therefore could not join in the Avowry, but should avow severally; and it was adjudg'd *per Curiam*, that they were Jointenants; for when Sir *Robert Carr* had granted an Annuity to five, the

Salk. 390.
Comb. 329.
5 Mod. 25.
Equally to be divided will not make a Tenancy in common in a Deed, as it does in a Will.

Words

Postea Mich.
11 W. 3.
Fisher *versus*
Wiggs.

Quoted in this
Case 1 In. 189.
Litt. § 298.
2 Ro. Abr.
90 Style 211.
Yel. 1 In.
180. 1 Cr. 74.
Dy. 361.
Cr. El. 25.
1 Saund. 282.

Words *equally to be divided* shall not make a Tenancy in common in a Deed, and the Limitation of 20 *l.* apiece is only by way of Distribution, and not severing the Grant; and they compared it to *Knight's Case*, 5 Co. 55. where it is held that the Rent issues out of the Entierty, and the *ciz.* 10 *l.* for one, &c. was only an Indication of the several Values and Rates of the Land demis'd; for when the Grantor had granted one Rent of 100 *l.* to five, it is repugnant after to make it a several Rent of 20 *l.* apiece; as if one grant two Acres to two, *habendum* one Acre to one, and the other Acre to the other, 1 In. 169. b. Rent granted to two Copyholders by a third, of 20 *l.* *viz.* 10 *l.* to one, and 10 *l.* to the other, makes it not a Tenancy in common; so here a Limitation of 20 *l.* to each makes it not a Tenancy in common; *vide Hob.* 173. and if it were a Tenancy in common, the Avowry of each of them should be *pro quinta parte* of 100 *l.* and not for 20 *l.* and Judgment was given for the Avowant.

Attorney General versus Buckley, in Scac.

In Information, where after Verdict the Defendant dies before the Day in Bank, it is discontinued.

AN Information in the Exchequer by Attorney General against Defendant, and a Verdict was given against the Defendant; after Verdict, and before the Day in Bank, the Defendant dies; and Question was, if this Information were within the Statute 17 Ca. 2. c. 8. which enacts, that in all Actions real and personal, or mixt, the Death of either Party between Verdict and Judgment shall not be alledg'd for Error, so as such Judgment be entered within two Terms after such Verdict; and upon solemn Argument by *Ward, Powis* and *Hatsell* (*Lechmere* absent) it was held that an Information was not within the Word *Action*, nor the King within the Word *Party*; and that it was never said the *Death* but the Demise of the King; and adjudg'd that the Information should be discontinued.

Lee versus Daniel.

Disposal of Seats in the Church belongs to the Ordinary. Postea 233,

PER Holt, the Disposal of Seats in the Mother Church belongs to the Ordinary, and so of Seats in a Chapel or Eafe belonging to the Mother Church; and to know whether it be a Church or not, is by knowing whether it has *Baptisterium et Sepulturam*.

Per Holt, a Record of a Judgment is defeasible by Bond Defeasance or Deed.

King versus Lewis.

AN Indictment wanted the Words *in Com'*, and upon Motion Court would not amend it, but *secus* upon an Information. *Note*; it is Matter of Substance.

Indictment, wanting *in Com'*, not amended, *aliter* if Information.

In Communi Banco.

THE Case, as *Treby*, Ch. J. open'd it in his Argument, which I only heard, the rest having argued before I came, was thus:

An *Assumpsit* brought by an Executor, upon a Promise to his Testator; upon *non assumpsit infra sex Annos* pleaded, the Plaintiff replied, that his Testator took out a Writ against the Defendant within the six Years, and died during the Pleader, making him his Executor: And that he brought this Writ *per dietas computatas*; to which the Defendant demurr'd. And he held with his Brothers, that this Writ did not lie for an Executor upon Abatement of his Testator's Writ; and the Nature of this Writ is to recontinue a former Writ, with this Addition, that it may be amended for false *Latin*, or the like. *Cotton's Ab.* 34 *Ed.* 3. It must be the same Plaintiff that brings it, and *ideo* lies not for an Executor, Administrator, or Heir. *Rastal's Entries* 417, 107, 108. *C. El.* 174. Court was of Opinion it would not lie; yet there were frequent Occasions for Executor and Heirs to revive their Ancestors, &c. Writs, and yet we find no Instance of it; and then *Littleton's* Argument will hold, *Jenkenston*, f. 3. *pla.* 7. 6 *Co.* 10. 7 *Ed.* 4. *Mark Ocle's Case*, *Br. Journeys Accompt* 33. *Kelw.* 411. 1 *Vent.* 235.

Obj. There is no Case where the Act of God or of Law shall take away a Man's Right.

Answer. But there are many; before the Statute *de bonis asportat'*, in all Cases where Damages only were to be recover'd, the Executor was without Remedy; and a Pawn is not redeemable after Death of the Party that did Pawn. *A.* is murder'd, and the next Heir brings his Appeal, and dies, the Appeal is gone for ever. 27 *H.* 6. 64, 65. 14 *H.* 6. 7. In *Journeys Accompts* you shall never change your Count; and

the old Way of *Journeys Accompts* was to pray a new Writ, and then to proceed on the former Roll; *dieta* is *iter unius diei*. 1 *Rol. Ab.* 590. If by the Custom a Copyholder may only make a Lease for one Year, and he is licensed to make for ninety-nine Years; and it was doubted whether he could assign his License, or make an Under-Lease; and held he might; because the Lord's Interest was bound for ninety-nine Years.

Per Holt: He that has Power to sell, has Power to receive the Money; for if a Man give Power to his Servant to sell his Horse, he impliedly gives him Power to receive the Money; and Payment to such Servant is Payment to the Owner.

Bidolph and Bruce.

Admiralty.

Prohibition *nisi* Cause was granted to Court of Admiralty for Libelling there for Seamen's Wages; it appearing on the Libel, that the Service was all in the River *Thames*.

On *Capias*,
Sheriff has no
Power to re-
ceive the Mo-
ney.

Holt: Sheriff has no Power to receive Money from the Defendant upon a *Capias*, for his Business is only to execute his Writ; and if in such Case a Defendant paid the Sheriff, and he after become insolvent, and do not pay the Plaintiff, such Payment shall not excuse the Defendant; and if Sheriff suffer one in Execution to escape, Plaintiff has his Election to sue the Sheriff upon an Escape, or else the Defendant; but he cannot have a *Capias* against the Defendant without a *Sci' fa'*.

It was moved to discontinue a former Action pleaded in Abatement of a subsequent one, upon Suggestion that the Attorney in the former Action was not to be found. *Holt* would not allow it; but bid them plead *Nul tiel record*, and that Defendant would find their Attorney for them: And held, that one could not plead twice in Abatement.

Coxeter and Parson.

HE was libell'd against in the Spiritual Court for Calling a Clergyman a Blockhead, and that he wonder'd a Bishop would hold his Hand over him, and that he deserved to have his Gown pulled about his Ears; and Prohibition moved for, and 2 *Rol. Ab.* 295, 296. was cited; and *Holt* said he had known a Prohibition denied to stay Suit for Calling a Parson a Knave; but here they cannot punish one in the Spiritual Court for being a Blockhead; and to call a Justice of Peace a Fool, a Blockhead, and a Buffle-headed Justice, not actionable; and Prohibition granted.

Salk. 692.
Words.
Prohibition
to Spiritual
Court on Suit
there for Cal-
ling a Clergy-
man Block-
head.
Ante p. 104.

At a Trial at Bar, an Answer in Chancery, tho' not sworn, was given in Evidence; because it was proved to have been filed in the Six Clerks Office.

Answer in
Chancery filed
in the Six
Clerks Office,
Evidence.

If a Declaration be delivered the Day before the last Day of a Term, the Defendant has two Days in the next Term to put in an Answer; for he ought to have four Days in Term. *Per Cur'.*

On Declara-
tion delivered
the Day be-
fore the last
of the Term,
Defendant has

two Days in next Term to answer.

Holt: In all Actions upon a penal Statute common Bail suffices; but when a Writ is special, there cannot be common Bail, without Summoning before a Judge.

In Actions on
penal Statutes
common Bail
suffices.

Upon a *Sci' fac' quare executio non*, the Plaintiff in Error may assign Error; but if he do not, the Judgment is only, that Execution be awarded, and not that Judgment be affirmed.

Vide postea
in this Term
Wicket and
Foot v. Crea-
mer.

It was said by Sir *Sam. Astree*, that Indictments for Perjury, Forgery Maintenance, were never quashed on Motion, but Party is always put to plead to them; but as to Riots, or other Offences of a publick Nature, the Court indeed is very tender of quashing them; yet they do it daily, if they find it for a frivolous Matter.

Indictments,
some Sorts
quashed on
Motion.
Postea in this
Term, The
King v. Flint.

Coot and Berty.

Dower.

IN Dower, Defendant pleaded Elopement in the Wife; Wife replied, that her Husband had bargained and sold her to the Adulterer; and held bad; and Licence by Husband to Wife, to lie with another Man, cannot be pleaded in Bar to an Action of Trespass by Husband; nor that she was a notorious lewd Woman; but these Matters may be given in Mitigation of Damages.

Anonymus.

Visitation belongs to the Founder and his Heirs.

IN the Argument of a *Mandamus* to a College at Oxford, Serjeant *Wright* said, that upon a Return to a *Mandamus* they never make a *Profert in Cur'*; because the Party has never Oyer, or any Plea to make to it; and that it is a Rule in Corporations, *ubi major pars ibi totum*; and that the Master must be named in all corporate Acts; because without him nothing can be done, but that his Vote is included in that of the Majority. If a Man by Will gives Lands to a College already founded, with Charge to take in more into the Corporation; that cannot be but by Surrender of the former Charter and taking a new one; for Corporations cannot be at this Day but by Charter; before the Statute of 13 *El.* they might take a new Charter, and that had been a Surrender of their old one; But I am afraid they cannot do it without an Act of Parliament, because it is a Kind of Alienation; for it is a Giving a Part of the Right of the first Members away.

Holt: The Corporation is by Name of Master, Fellows and Scholars; and they are as it were the Common Council of the College; and tho' the King made the Corporation, yet the Founder has Power to dispose and order it as he thinks fit. And I take this to be altogether a Lay Corporation, and then the Visitation belongs to the Founder and his Heirs; and if he dies without Heir, I take the Visitation shall go to the King; of which *vide* 5 *Ed. 4. Simon de Monford's Case*; and this is my private Opinion; and whether the Right of Visitation should Escheat was a Point which divided the Court in *Dr. Patrick's Case*; and there is a great Diversity between Abbot and Convent, and Master and Fellows, Mayor and Commonalty, &c. For in Case

J. C. T. Raggan.
101. & 1. Feb. 65.

Case of Abbot and Convent, there must be the major Part, and the Abbot besides; and the Reason is, because the Abbot only acts *cum consensu* of the major Part of the rest; but in Case of Master and Fellows, &c. the Master himself is but Part of the acting Part, and he is one of the Grantors just as the rest. If it be a Donative, and a private Corporation, tho' it be Spiritual, I am of Opinion the Visitation belongs to the Founder, tho' he does not by express Words reserve it to himself; for why should it of common Right belong to the Ordinary. And whether the King may grant the Inheritance of a Visitation may be a Question; for it may be said to be privy to his Person; but without Doubt he may grant to whom he pleases to be Visitor for a Time.

Abbot and
Convent differ
rent from Ma-
ster and Fel-
lows.

Jacob versus Dallow.

SUIT was in Spiritual Court concerning the Right of a Seat in a Church; and suggested for a Prohibition, that Right of Seat in a Church was Temporal Matter, determinable at Common Law. But *Cur'*: If you would prescribe to a Right against the Ordinary, you must shew a Usage to repair the Seat; but in an Action on the Case for Disturbance, you need only lay Possession against any other Disturber; and of common Right, the Disposal of Seats in a Parochial Church belongs to the Ordinary. 2 *Bulst. May* and *Gilbert. Hob. 69. Boothby* and *Baily* was held otherwise in this Court, in *Buxton* and *Baker's Case*, upon Diversity between Action upon Case and Prohibition.

Salk. 551.
5 Mod. 436.
In Case, for
Disturbance of
a Seat in a
Church, 'tis
sufficient to
lay Possession.
Ante p. 228.
Simile.
2 Mod. 283.
3 Lev. 74.
Vide Ray. 52.
1 Lev. 71.
2 Jon. 4.

Spack and Spicer.

TRESPASS against ten, two of them make Default, and the rest acquitted by a Verdict, certified to be against Evidence, and a Writ of Enquiry of Damages against the two was executed; and a new Trial moved for, and denied *per Cur'*; because Plaintiff had Damages and Costs against two; and *Holt* said, the Jury ought not to be allowed to sever the Damages; and that in Action against twelve, and two of them make Default, and the rest acquitted against Evidence; yet there ought to be no new Trial, because there were Costs once recovered. If Trespas brought against two, and one of them makes Default, and the other is found guilty, and Damages be against him; and then the

New Trial refused, where Writ of Enquiry had been executed against some.

O o o

other

other comes in, and a Declaration is against him, with a *Simul cum*, and Damages against him too, being found guilty, and the two *Postea's* are return'd, here the Plaintiff may chuse *de meliorib' damnis*; but here he should have enter'd a *Non prof.* against these two; tho' even so, I durst not warrant him a new Trial.

An Indictment for common Nuisance is never quash'd upon Motion.

If Declaration be delivered before *Craftin' animarum*, the Plea must be put in before Essoin-Day of next Term.

Petit Sessions, not Sessions for making an Order concerning the Poor.

King versus Camberwell.

BEFORE the Statute of 4 & 5 W. & M. forty Days Service made a Settlement, and then an Act comes and says, *be it declared, that no Service less than a Year shall make a Settlement*; that Word *declared* shall not make a Retrospect to avoid a prior Judgment upon the former Statute.

— versus *Palmer.*

Award.
Made by Rule
of Court, that
Money should
be paid on one
Side, and no-
thing awarded
on the other;
Court will not
grant Attach-
ment till a
Release be
tender'd.

A Submission to Award was of all Matters in Controversy, by Rule of Court; and Award made, that so much Money should be paid of one Side, and nothing was awarded of the other Side; and moved to set it aside, as being an Award only *ex parte*. *Holt*: The common Exceptions against an Award will not hold here, it being an Award, upon Submission by Rule of Court; for tho' there be no Release awarded of one Side, yet the Submission was of all Matters in Controversy; and we will not grant an Attachment before they tender a Release; for if one come to have Aid of the Court, he shall do that which is fair and equitable before he has it.

Pratt moved to quash an Indictment taken before Justices of Peace; for that it was only *Justiciar' ad pacem*, without *Conservand' assignat'*; but refused; for Court said, tho' it were an old Exception, yet they did not like it. Vide tamen
1 Saund. 263.
Indictment
quashed for
the same Ex-
ception.

Per Holt: If Writ be returnable this Term; and does not come in till the next, it ought to be filed of the Term whereof it is returnable. *Note*; The same Thing was ruled by him *Mich. 4 Ann.*

Clerk versus Butler.

Defendant came & defendit vim & injuriam quando, &c. and then would plead Misnomer; and said, he could not plead that, or to the Jurisdiction of the Court, after pleading *Defendit vim & injuriam*; for that he had admitted himself by that Name. *Brownl. 203. 204. Co. Ent. 122. Rast. 146, 107. Cur' adv'.* Misnomer not
to be pleaded
after Defence
made.

Jennison and Ellis.

UPON Writ of Error, Want of Original assigned, and one certified varying from the Declaration; and *Holt* said, let Variance be ever so great, yet since it is so certified, it shall be taken for the Original in this Action. Original Va-
riant.

King versus Moor.

HE was indicted for suffering Bone-lace Makers to set up their Goods upon Stalls within his Yard, and taking so much a Piece from them for it; it was said to be a Setting up a Market, and that a *Quo Warranto* would lie; and by Consequence an Indictment for the User; and here he pleaded guilty, and submitted to a Fine; and hereupon, tho' he had entered into a Recognizance to try it, his Recognizance was discharged. On submitting
to a Fine, the
Recognizance
entered into
for Trial to
be discharged.

Per Holt: One may Libel in the Spiritual Court for Tithe of Rakings of Corn, if it never was gathered into Sheaves; but *secus* after Corn has been gathered into Sheaves,

Sheaves, and there was no Fraud in the Gathering; and Prohibition would lie.

1 Jo. 139.
Postea Mich.
13 W. 3.
Dom' Rex
v. Love.
Bail may be
surrender'd
without No-
tice, before
Recognizance
forfeited.

Per Holt: If one surrenders in Discharge of Bail, before Recognizance forfeited, he need not give Notice to the Plaintiff, but it may be pleaded to the *Sci' fac'* against the Bail; but where a *Capias* is gone, and a *Non est inventus* returned, whereby he forfeits his Recognizance; if he would ask a Favour of the Court, he ought to give Notice.

Holt: It is a *Quare* if a Parson may demise all his Living; because it may amount to Non-residence.

Holt: The *Custos Brevium*, upon a *Certiorari* directed, &c. has no Power to certify any Original, but such as are of that Term of which the *Placita* are.

Anonymus.

Prohibition
after Sentence.
Postea in this
Term, Grimes
v. Lovel;
*nota diversifi-
catem.*

LIBEL was in the Spiritual Court for Calling a Woman *Whore*, and saying *that she kept a Bawdy-house*; and after Sentence Prohibition was moved for; and urged *contra*, that they should have alledged below, that the Words were spoke at one and the same Time, and then they might be prohibited; but now that they have Jurisdiction below for Calling a Woman *Whore*, and that was all they gave Sentence for; they would not grant a Prohibition.

Lug versus Lug.

Will of perso-
nal Estate
made before
Marriage
presum'd to be
revoked by it.
Sal. 592. S.C.
2 Sho. 242.
Vide 2 Vern.
104, 148.

IT was decreed by the Delegates, of which *Treby C. J.* of the Common Bench was one, That where *A.* had made a Will, and by it devised all his personal Estate to *B.* and *C.* and after *A.* marries *D.* by whom he had several Children, and dies, without taking any Notice of this Will; that this Marriage of *A.* with *D.* amounts to a Revocation of this Will; but that it is only a presumptive Revocation; and therefore if by any Expression, or other Means, it had appeared that the Intent of it was, that it should continue in Force, the Marriage had not been a Revocation; and the Sentence given in the Spiritual Court was affirmed.

Bishop

*Bishop of St. Davids versus Lucy.**J. C. R. L. Raym. 147.*

LUCY promoted a Suit *ex officio* before the Archbishop of *Canterbury*, against the Bishop of *St. Davids*, upon several Articles for Simony, and other Offences; the Bishop put in his Answer; and Proofs being made for the Promoter, the Bishop appealed upon a *Gravamen* to the Delegates; and pending the Appeal, moved for a Prohibition, on Suggestion, that the Matters contained in the Articles were of Temporal Conusance; and 1st, It was urged for a Prohibition, that it did not appear that the Bishop of *St. Davids* was cited to appear in any Court, of which the Law took Notice; for the Citation is to appear before the Archbishop of *Canterbury*, or his Vicar General, in his Hall at *Lambeth* House, to answer, &c. which is not a Court of which the Law takes Notice; for the Archbishop having the same Power over his Suffragans, that every Bishop has over the Clergy of his Diocese; and no Bishop can cite any of his Clergy before him, but in his Court; therefore the Citation here ought to have been to appear in the Arches, or some other Court of the Archbishop. But it was answered, that doubtless the Archbishop had Jurisdiction over all the Clergy within his Province; and cited the Case of Dr. *Wood* Bishop of *Litchfield* and *Coventry*, 1687. that was suspended by Archbishop *Sancroft* for Dilapidations, and the Profits of his Bishoprick were sequester'd, and the Episcopal Palace built out of them; and *Holt* said, that to admit this Point of Jurisdiction to be disputed, was to dispute Fundamentals. For the Archbishop had without Doubt Provincial Jurisdiction over his Suffragan Bishops, which he may exercise in what Place of his Province he pleases; for it is not material to be in the Arches, any more than in any other Place; for the Arches is only a Peculiar, consisting of twelve Parishes within *London*, exempt from the Bishop of *London*, and that is properly the Arches; and tho' the Provincial and Metropolitan Jurisdiction be exercised there also, yet it may be exercised elsewhere: For the Citation is to appear before the Archbishop, or his Vicar General, who is an Officer the Law takes Notice of; for the Vicar General in the Province is the same as the Chancellor in a particular Diocese; and the Dean of the Arches is also a Vicar General of the Archbishop over all his Province; and acts in the Arches sometimes as Vicar General, sometimes as

Bishop cited to
appear before
the Archbi-
shop himself.
Salk. 134.
Carth. 484.

Archbishop
may exercise
his Provincial
Jurisdiction
over Suffragan
Bishops in
what Part of
Province he
pleases.

Dean of the Arches. Then it was objected, that the Matters contained in the Articles were of Temporal Consequence. The first whereof was, that the Bishop, being Incumbent of the Rectory of *Burrough Green* in *Cambridgeshire*, in the Diocese of *Ely*, covenanted with *William Brooks* for 200*l.* to make him his Curate, and to resign the Rectory to him on Request; and it was argued, that this Contract was made as Incumbent of *Burrough Green*, and not as Bishop of *St. Davids*; and therefore ought to be sued for it in the Consistory Court of *Ely*, and not *per saltum* before Archbishop, in Case this were admitted to be Simony. 2dly, That there is no Matter alledged in this Article, that amounts to Simony; for the Bond to resign was never executed, and therefore is not within the Statute of *Eliz.* To which it was answered, that if the Bishop makes a Simoniackal Contract, it is a Personal Offence in him, and against the Duty of a Bishop; and punishable by the Metropolitan by Ecclesiastical Censures: But if the Archbishop proceeded against the Bishop to deprive him of his Benefice of *Burrough Green*, the Objection might have held; and of that Opinion was the whole Court. And as to the second Objection, it was answered, that this is a Simoniackal Contract, and punishable by Ecclesiastical Censures; and properly so before the Statute of *Eliz.* by Spiritual Law; then if the Fact be Simony, it is conusable in the Spiritual Court, as it was before the Statute, the Buying of Crisme, or any Thing *quod ad spiritualia pertinet*, is Simony; but the Common Law takes no Notice of any Simony but what the Statute mentions; which has not defin'd Simony in such a Manner, as to say what shall be Simony, and what not, by the Spiritual Law. And if the Archbishop, &c. shall adjudge that to be Simony, which is not so, it is good Cause of an Appeal, but not of a Prohibition; *quod fuit similiter concess' per Cur'*; and *Holt* said, that Simony is such an Offence by the Canon Law, as incurs Deprivation; and the Common Law does not take Notice of it to punish it; there is not the Word *Simony* in the Statute of *El.* but only *Buying* and *Selling*; and it would be very unjust, if Ecclesiastical Persons offend against their Ecclesiastical Duty, in such Instances as the *K. B.* cannot take Notice of, that we should prohibit them to punish them according to their Law. The Clergy are obliged to obey Laws which Laymen are not; for a Convocation, with Consent of King, may make Canons to bind the Clergy; and the Disobeying them is Cause of Deprivation; and so were the Canons of 1603. and Simony was defin'd

Convocation,
with Consent
of the King,
may make
Canons to bind
the Clergy.

defin'd to be *Studiosa voluntas emendi aut vendendi Spiritualia aut Spiritualibus annexa.* 3 Cr. 789. Mo. 779. and that a Contract might be good at Common Law, and yet be Simony. Then the Bishop's Counsel urged against the Article for taking excessive Fees for Institution, Conferring of Orders and Procurations; that these were Extortions punishable by Indictment. But *per Curiam* it was said, that of Common Right, and by Canon Law, no Parson could take any Thing for Christnings, Burials, Visiting the Sick, &c. but by Custom they have been allowed to take something; and Procurations are only suable in the Spiritual Court, and a meer Spiritual Duty. For these Things Parsons were obliged to do *ex officio gratis*, and taking Money for them was Simony, and now taking more than Usage allowed will be so still. Then it was urged by Counsel against another Article, *viz.* that he ordained one without administering the Oaths to him; and yet certified under his Episcopal Seal, that he had taken the Oath, which is punishable at Common Law, by the Statute of 1 W. & M. being a Breach of that Statute. But it was answered by the Court, that this Statute had made it Part of the Office of a Bishop to tender the Oaths upon Ordination; and then the Metropolitan may proceed against him for doing contrary to the Duty of his Office, but not to punish him as for a Temporal Offence. So is 5 Co. *Caudrey's Case*, where by special Verdict it was found, that *Caudrey* was deprived by the High Commissioners, for Preaching against the Common Prayer; and tho' there was another Punishment appointed by the Statute, and not Deprivation till the second Offence; yet it was adjudged they might proceed by their proper Law, and deprive him; it being against his Duty as a Minister so to preach. If a Clergyman be perjured, &c. after Conviction here, he may be proceeded against below in Order to Deprivation. Sir *John Savage's Case* in *Kelw.* if Keeper of a Gaol suffer an Escape, King may seise upon his Office immediately; and it may be Felony besides; but the Seisure of the Office shall not be for the Felony, but for the Neglect. So here other Articles were for Misemploying the Revenues appropriated to the Finding a Schoolmaster and an Usher, and putting in Women in their Stead; and for Detaining of Exemplifications of Letters Patent, &c. a Prohibition was granted; and the Rule discharged as to all the Rest. After the Bishop was deprived, and the Sentence on Appeal confirm'd by the Delegates.

Canon Law requires Bishops should every three Years visit their Diocese *parochialim*; and this was at the Charge of Inferior Clergy; but because they used to put them to great Expences, the Matter was at last reduced to a Certainty; and if Bishop took more, he was punishable by Canon Law.

Where a Statute makes a Thing a Temporal Offence, which is punishable by Canon Law, may also proceed to Deprivation, but not punish it as a Temporal Offence.

Postea Hill.
11 W. 3. The City of London v. Vane-cre.

Note ;

Note; Here it was held, that by the Council of *Chalcedon* received in *England*, *Can. 2.* and Council of *Lond.* 810. it is Simony to take Money *pro Institutione*, or *Ordinatione*; and that Forging of Orders was originally of Spiritual Conusance, and not by the Act 31 *El.* that misapplying Revenue is Cause of Deprivation. That when the Act commanded him to tender Oaths, and he disobey, it is good Cause of Deprivation; as if an Act of Parliament should desire the Judges to do something, and they should not obey, it is a Forfeiture of their Office: And lastly, that by Canon Law received in *England*, such as put Episcopal Seal to a Falsity, or use such Impression knowingly, *incurrunt penam falsarii.* *Card. Otho. Const. f. 65.* *Linwood Proc.*

Wicket and Foot versus Creamer.

Salk. 264.
Death of one
Plaintiff in
Error is no A-
batement of
the Writ.
Ante p. 231.

DEBT on a Bond for Performance of Covenants *versus* Defendants, and Judgment for Plaintiffs; whereupon Defendant brought Error, but put in no Bail; *Wicket* died, the Survivor sues out two *Sci' fa' quare executio non* of the Judgment; and on two *Nihils* return'd, he had an Award of Execution, and a *Capias ad satisfac'* issued; whereupon the Plaintiff was taken in Execution, and *Rob. Eyre* moved to discharge him; because the Writ of Error was a *Supersedeas* to the Execution, without any Bail; it being a Bond for Performance of Covenants, and not for Payment of any Money; and the Death of one Plaintiff in Error is no Abatement of the Writ; *quod Curia concessit.* But it was urged of the other Side, that the Execution was good; because the Defendant had an Opportunity of Pleading the Writ of Error pending, which he not doing could not take Advantage of it now. But *Cur' contra*; for two *Nihils* being return'd, he had no Day to plead it; but if a *Sci' feci* had been returned, it had been otherwise; and on that Difference an *Audita querela* hath been often allowed and disallowed: And in many Cases, where the Defendant may have an *Audita querela*, the Court will relieve on Motion; but if the Ground of the *Audita querela* be a Release, or other Discharge, it may be reasonable to put the Defendant to his *Audita querela*, that the Plaintiff may deny it, if he thinks fit; and a *Supersedeas* was in this Case awarded, *quia erroneè emanavit*; and in this Case the Survivor had no Occasion for a *Sci' fac'* to revive the Judgment, for it survived to him.

Robertson versus Moor.

IN Ejectment; between the first Day of Assizes and Verdict the Defendant died; and upon *Affidavit* of this Fact, the Defendant's Counsel moved to stay Execution; and said this was not help'd by 17 *Ca. 2.* and quoted 1 *Sid. 131. Hard. 51.* where the like Motion had been granted; and Gould Justice said, he had known it granted, and as often denied. But *per Cur'*, Let Things stay till Notice of Motion to Plaintiff; but after the Court held the Judgment well entered.

In Ejectment;
Defendant
died between
the first Day
of the Assizes
and Verdict.

The Governor and Company of the Bank of England versus Newman.

Bellamy gave a Bill of Exchange payable to N. or Bearer; N. went and negociated it with the Bank, at the usual Rate of Interest; after this the Bank received 100*l.* of Bellamy, and after that demanded the Money due on the Bill of a Servant of B. who did not pay it; and after Bellamy failed, and Bank brought an *Assumpsit* against N. for the Money; and on General Issue a Verdict for Plaintiff; and a new Trial granted, the Verdict being against Law; for whatsoever may be the Practice among the Bankers, the Law is, that if a Bill or Note be payable to one or Bearer, and he negociates the Bill, and delivers it for ready Money paid to him, without any Indorsement on the Bill, this is a plain Buying of the Bill; as of Tallies, Bank-Bills, &c. but if it be indorsed, there is a Remedy against the Indorser. But Holt laid the Rule thus: If a Man gives such a Bill for Money not due before *without Indorsement*, it is a Sale of the Bill: And he held, that a Demand of a Servant of the Drawer, who used to pay Money for him, was a good Demand.

Bill of Ex-
change pay-
able to A. or
Bearer.

Ante p. 203.
Postea 204.

Lawly versus Dibble.

Northey moved to bring Money into Court upon a Covenant, and was refused.

Money
brought into
Court.

Ante p. 90, 95, 187, 188. Postea Pasch. 12 W. 3. Farrell's Case.

Q q q

The

The King versus Flint.

Indictment
uncertain.

INDICTMENT against a Baker *quod sex Collyras, Anglice Loaves, panis triticei debitum pond' minime contin' & sex Collyras panis domestici debitum pondus minime continen' venditioni exposuit*; upon Demurrer, 1st Exception was, that it did not appear but both the Six Loaves were the same, and so Defendant would be punished twice for the same Offence. 2. It does not appear what the *debitum pondus* or Assize of Bread was, or how much these Loaves fell short of it, and so too uncertain; for Offence ought to be so certain, that the Defendant might plead it to another Indictment, and the Court might measure their Fine by the Nature of the Offence; and Judgment for Defendant; *vide 5 Co. 121.* And Ante p. 231. note; Court would not quash this Indictment on Motion, because oppressive of the Poor.

Grimes versus Lovel.

Calling a Woman *Whore*, and *pocky Whore*, not suable in the Spiritual Court.

Ante p. 236.
Postea 248.

LIBEL in the Spiritual Court for these Words, *you are a damn'd Bitch, Whore, and a pocky Whore, and if you have not the Itch, you have the Pox*; and moved for a Prohibition, because an Action lies at Common Law; and a Difference was taken, where the Word *Pox* could not be intended but of the *French Pox*, by the Words that were joined with it, there Action lies; and *Holt* said, that where the Word *Pox* was joined with the Word *Whore*, it should be intended of the *French Pox*; and Prohibition granted.

Gilbert versus Inhab' de Puddlesgate.

Hue and Cry.

ACTION upon the Statute of Hue and Cry; *Non culp'* pleaded, and Verdict *pro Quer'*; moved in Arrest of Judgment, that no *Venue* was laid, where the Examination before the Justice of Peace was within twenty Days, which was traversable, and not aided by Verdict, it being a penal Law. But *per Cur'*, this is a remedial and not a penal Law; and if penal, yet this is well enough; because it is not that which intitles Party to Action, but only the *Causa sine qua non*; but perhaps it might be fatal on a Demurrer.

Hilton versus Byron.

HILTON a Quaker prayed Security of the Peace against *Byron*, and offered to make his Declaration according to the late Act of Parliament, that he was afraid of his Life, &c. but this being a Criminal Matter the Court held it to be out of the Act; and would not grant it, except he would take the usual Oath.

Oath required from Quaker on his demanding Surety of the Peace.

Hart versus Hall.

MOTION for a Prohibition to stay a Suit for Tithes of an old Mill, viz. every tenth Toll-Dish, on Suggestion that it was an old Mill; but *per Holt*, the Plaintiff ought in his Suggestion to prescribe *in non decimando*, and also to bring an *Affidavit* of the Truth of the Fact; and so it was adjudged in Lord C. J. *Hale's* Time, in the like Case; for he said, that of common Right Tithes were not due out of a Mill; yet before the Statute of *Articuli Cleri* some Mills did pay, and some did not, and upon that it was enacted, that *de molendino de novo erect' non jacet prohibitio*; and for such as paid before that Statute, they shall still pay; and he said, Tithes were either predial or personal, for the Corn paid Tithe before; and it is necessary to prescribe in a *Non decimando* in an old Mill; and he quoted the Case of *Hughs* and Lord Viscount *Hertford*.

Tithes of a Mill.

King versus Cole, at Guild-hall.

THE Defendant was indicted, for that he being a Bankrupt, and brought before Lords Commissioners, he refused to give them an Account of his Effects; and his Defence at Trial, upon Not guilty pleaded, was, that he was an Infant at the Time of the Debts contracted, and therefore could not be a Bankrupt; and of that Opinion was *Holt*; for tho' the Debts of an Infant are only voidable at his Election, yet no one can be a Bankrupt for Debts he is not obliged to pay; wherefore the Defendants were acquitted.

Infant cannot be a Bankrupt.

Holt

Admiralty.

Holt denied to grant a Prohibition to Admiralty for refusing to give a Copy of the Libel; because the Stat. 2 H. 5. c. 3. extends only to Ecclesiastical Court, and not to the Admiralty.

Lambert versus Oakes, at Guild-hall.

Salk. 127.
Bill of Exchange to be demanded of the Drawer before the Indorsee liable.

Ante p. 241.

Ante p. 193.

R. Drew a Bill payable to *O.* or Order; *O.* indorses it to *L.* and *L.* brings Action for the Money against *O.* and by *Holt* it was said, that he ought to prove that he had demanded or indeavoured to demand his Money of *R.* before he could sue *O.* on Indorsement; so if the Bill was drawn on any other Person, payable to *O.* or Order, and the Demand to intitle *L.* to his Action ought to be after the Indorsement. 2. *O.* indorsed this Bill blank to *L.* by Writing his Name only; and therefore it was urged, that this was a Sale of the Bill, and the Indorsement could not subject the Indorfor to an Action; but *per Holt*, the Indorsement, *tho' upon Discount*, will subject the Indorfor to an Action; because it is a conditional Warranty of the Bill, and makes a new Contract, in case the Person on whom it was drawn do not pay. 3. *Per Holt*: If a Man indorses a Bill Blank to *B.* he puts it in the Power of *B.* to superscribe what *B.* pleases. 4. If Indorsee does not demand the Money payable by the Bill, on the Person on whom it is drawn, in a convenient Time, and after he fails, the Indorfor is not liable. 5. If the Action be brought against Indorfor, it is not necessary to prove the Hand of the Drawer, for *tho'* it be forged, the Indorfor is liable.

Tod versus Stokes, at Guild-hall.

Salk. 116.
Husband not liable to Debts contracted by the Wife after notorious Separation, and Maintenance allowed her.

THE Plaintiff an Apothecary sued the Defendant, a Parson living in *Chichester*, for Physick administred to his Wife in *London*; on *Non assumpsit* pleaded, it appeared on Evidence, that the Defendant and his Wife had been parted by Consent for five Years last past, and that on Separation, by Articles to Trustees of Wife's naming, the Defendant had obliged himself to allow the Wife 20*l.* a Year; which he did accordingly, and had a Covenant from the Trustees to exonerate him of all the Charges of the Wife; and that the Plaintiff did not know the Wife to be a Feme

Covert

Covert at the Time of the Medicines given. And *per Holt* these Points were held; 1st, That the Reason why the Husband shall pay Debts contracted by Wife is upon the Credit ^{Vide 2 Lev.} 16. the Law gives her by Implication, in Respect of Cohabitation; and is like Credit given to a Servant. 2. That if Husband and Wife part by Consent, and Husband secures her an Allowance, it is in Consideration, that he should not be charged any more by her; and it is unreasonable he should be charged for Victuals, or Physick, or other Necessaries after. 3. That a personal Knowledge of such Agreement is not necessary, so it be publickly and notoriously known. 4. That such publick Knowledge of the Agreement need not be at *London*, where the Debt is contracted, but is sufficient if it be where the Parties lived, *viz.* in this Case at *Chichester*. 5. That if the Debt were contracted by the Wife in so short a Time after the Agreement, as it could not be known at *Chichester*, in that Case the Husband would be liable. 6. If Husband turns away his Wife, he must send Credit with her for reasonable Expences. 7. If Wife goes away without Consent of Husband, she shall find Credit where she goes, without any Charge to Husband, or his giving any personal Notice of leaving him; and he said, *Scot* and *Manby's* Case had been carried too far in this; and he remember'd a Case before him at *Exeter* Assizes, 10 W. 3. between *Lungworthy* and *Huckmore*, where he held, that if Wife elopes from her Husband, and takes up Necessaries from a Tradesman, who has no Notice of the Elopement, the Husband should not be liable; and it is sufficient for Husband to give general Notice, that Tradesmen, &c. should not trust his Wife. But Serjeant *Wright*, now Lord Keeper, at the same Time acquainted his Lordship, that *Treby* C. J. of Common Pleas had ruled that Point otherwise in an Action between the same Parties; to which *Holt* said, that notwithstanding he would adhere to his Opinion in all the Points aforesaid; and Plaintiff was nonsuited.

Postea Pasch.
12 W. 3. Car
w. King.

Turner versus Brent, at Guild-hall.

A. Sells Goods to *B.* to which he has no Title, if *A.* ^{Deceit.} knows he has no good Title to them, Action lies against him for the Deceit, if the Owner recovers them against *B.* but *secus* if *A.* does not know but his Title to them is good.

R r r

Rigdon

Rigdon and Hedges, Judge of the Admiralty.

Admiralty.
Goods arrested
by Admiralty,
Process rescu-
ed.

GOODS were arrested in the River *Thames* by Process of the Court of Admiralty, and Rescue made, and Warrant against *Rigdon* for a Contempt of their Process; and in Motion for a Prohibition it was suggested, that the original Process was of a Thing out of their Jurisdiction, and therefore there could be no Contempt.

1 Vent. 180.
1 Mod. 81.

Econtra, it was urg'd this Suggestion came too soon, because it can't be known whether they have Jurisdiction or not, till Bail be put in to the Action; and so in Ecclesiastical or Inferior Courts, if Prohibition be sued on Suggestion, that Cause of Action is out of their Jurisdiction. 1 Vent. 180. 1 Mod. 81. So in case of *Modus* for Tithes you must Suggest you pleaded it below; and so on Proceeding below for Words, and without doubt they might have a Jurisdiction; and their Way had been to move for a Prohibition immediately, or to put in Bail, and then to move upon the Libel; and every Court that has a Jurisdiction may punish for Contempt of their Process; and here Court will give them the Credit that they do right, till contrary appears. *Holt*: Sure the Cause that brings it within their Jurisdiction ought to be set forth in their Process; and it is too general to say *in Causa Maritimâ*; if Goods be taken at Sea by Pyrates, and sold by them at Sea, and brought to Shore, Prize or not, shall be tried in Court of Admiralty. 2 Saund. 260. Ray. 189. 2 Mod. 237. They would not grant Prohibition without Affidavit that they had pleaded the Matter below; and it was said, the Usage is by Warrant to seize the Goods, which upon Bail are delivered back, and then a Libel is given. But *Cur'*, let Prohibition go, and declare *instante*, and we will hear Civilians next Term: And here *per Cur'*, If Ship be arrested by Warrant of Court of Admiralty within their Jurisdiction, and after is rescued, they may re-seize her out of their Jurisdiction, and no Prohibition lies.

In their Pro-
cess the Cause
to bring it
within their
Jurisdiction
should be set
forth.

2 Saund. 260.
Ray. 189.
2 Mod. 237.

If arrest a
Ship within
their Juris-
diction which
is rescued,
may re-seize
any where.

Hyde versus S——.

TRespafs against Husband and Wife; Husband died, and Sir *Francis Winnington* moved it in Arrest of Judgment; *sed non allocatur*, for Wife may commit Trespafs along with Husband, and also Felony, if it be not by Coercion of

Keyl. p. C.
31. contra.

of Husband; and tho' in Declaration in Trover against Husband and Wife, laying Conversion *ad usum ipsorum*, Judgment was arrested; yet if it came in Question again, it should not be so by my Consent. *Holt.*

Bully versus Palmer.

PLaintiff brought Case for a false Return to a *Mandamus*, commanding him to swear *Harris* to be Mayor of the Town of *Dartmouth*, and a peremptory *Mandamus* moved for. It was resolved by Court, that if there be an old Charter surrender'd, but Surrender not enroll'd, and a new Charter in Consideration of the Surrender granted, that the second Charter is void; and if there be any other Persons in the new Charter than were in the old, any Law made by them is void, because they act under a void Charter: But *secus*, if it be the same Members in the old Charter, because then they Act by their first Charter, which is still good. So if in the first Case, if they had given a Bond, and put the Seal of the new Corporation to it, it would be void, as was adjudged in the Case of *Bath* and *Wells*: But if the Members of the old Charter had gone to Election, and some, by colour of the new Charter, had voted with them against their Will, there a Choice by Majority of the old Charter with some mention'd in the new is good.

Salk. 190.
A new Charter granted in Consideration of the Surrender of an old Charter, which Surrender was not enrolled, is void.
Post 253.

Johnson versus Nayler.

IT was a Writ of Execution bearing Teste in Vacation, and I moved to have it amended; and the Case of *Smith* and *Harwood* in new *Jones* and *Dyer* 129. were cited, but Court would not grant the Motion.

T. J. 41.
Writ of Execution not amended.

Per Cur'. If in Case where King's Revenues or Right is concern'd, tho' there be Evidence *pro* and *con*. yet if it be against the Strength of Evidence, it is fit for new Trial.

New Trial.

Attorney of Court, upon Motion, gets his Name struck out of the Roll, he shall never after be admitted to act as Attorney: *Per Cur'*.

Attorney.

If Rescous be return'd, Attachment shall go of Course without Motion: *Per Cur'*.

Attachment.

Leave

Information
for combining
not to sell un-
der a set Price.

Leave was granted to file an Information against several Plate-Button Makers, for combining by Covenants not to sell under a set Rate; and *per Holt* it is fit that all Confederacies by those of a Trade to raise their Rates, should be suppressed.

Baker versus Chandler.

JUDgment and Execution thereupon were set aside, for that Plea was put in before Judgment signed.

Whitfield and Powel.

Ante p. 242.

PROhibition granted to Spiritual Court to stay Suit there for calling a Woman a Pocky Whore. 3 Cr. 314.

Broom versus Holford.

ACTION upon a Penal Statute, and the Sum mistaken in Declaration, and Leave given to amend it, Writ being general.

Roe versus Nedham.

JUDgment a good Plea in Satisfaction of a Bond: *Per Curiam.*

Shales versus Seignoret.

Covenant to
pay on af-
signing of
Bank-Stock;
Tender of
Transfer
should be the
Breach assign-
ed.

DEFendant covenanted with the Plaintiff, that he would pay him 100*l.* in Money, and give him Credit for 100*l.* more, upon the Plaintiff's Assigning him 1000*l.* Stock in the Bank of *England*; and that the Defendant would accept the same, upon Notice, on or before twenty-fourth of *May* next following. In Covenant, Plaintiff alledged Notice to Defendant, that Plaintiff would be ready to make the Transfer on the said twenty-fourth of *May*, but that Defendant did not come to accept; and Non-payment of Money assign'd for Breach, &c. And *per Cur'*, the Breach is ill assign'd, for they should assign for Breach, that they had tendred a Transfer, and

and that Defendant did not accept, for there was nothing to be paid but after 'Transfer.

Per Holt ; an Act of Parliament concerning Revenue of the King is a publick Law ; but it may be private in respect to some Clauses in it relating to a private Person. Statute concerning Revenue is publick.

Dennis versus Roberts.

A CT of Composition, and a Composition pursuant thereunto, was pleaded in Bar to an Action of Debt upon a Bond, without reciting Act, or laying Venue for the Composition ; and for these Faults, *Jud. pro Quer'*. Venue.

Adams versus Cox.

PER Cur' ; in *London* the Plaintiff never excepts against Bail, but there is an Officer who receives Bail ; and if he takes insufficient Bail, upon Complaint made to the Aldermen, he must either pay the Debt, or the Profits of his Office are sequestred 'till the Debt is satisfied. And when a Cause is removed up hither, the Bail and Clerk below are discharged ; and if the Bail given below be offer'd here, they may be excepted against. Bail in London never excepted to

White versus Mullony.

A Mathematick Master being offer'd for Bail, by the Name of Gentleman, *Holt* said he was one by his Profession. Addition.

Birch versus Wood.

A Vicar libel'd in Spiritual Court for a Stipend of 4 *l. per Annum*, claiming it by Prescription ; and Prohibition moved for upon Suggestion, that none can claim a Stipend by Prescription but a Corporation, or Body Politick : And so said *Holt*, and that a Sheriff, tho' removable at Will of King, may claim a Fee as incident to his Office. But against the Prohibition were cited *Litt. Reports* 19, 51. Stipend can be claimed by Prescription by Body Politick or Corporate only.

King versus Dutton and others, Printers.

Certiorari to
remove Indict-
ment out of
London.

INDICTMENT being found against them in *London* for printing and publishing a Paper, intitl'd *The Black Ram*; wherein certain Persons were scandalously described, so as any body that knew them, might know them to be the Persons described, and among others the Recorder of *London* was maul'd; and *Certiorari* moved for by *Montagne*, insinuating that it would be a Harship to be tried at the *Old Baily*, where some of the Judges might take themselves to be scandal'd by that Paper: And the Court said, they seldom would grant *Certiorari* to *Old Baily*, yet they granted one here, tho' it could not be tried here this Term; for *Certiorari* into foreign County ought to have fifteen Days between its Teste and Return, and tho' by Consent it may be return'd *immediatè*, yet still there must be fifteen Days between Teste of Writ and Return of Jury; which could not be within this Term.

There should
be four Days
between the
Return of the
Poslea and
Judgment
entred.

Per Cur'; Regularly there ought to be four Days between the Return of *Poslea* and Judgment entred; that is, if there be four Days of the Term unspent at the Return; but if there be not so many Days to come of Term, there ought to be the utmost Time within the Term, but still Judgment may be entred that Term.

Austen and Baker.

Assumpsit in
Consideration
that *A.* would
deliver Goods
to *C.* he *B.*
would see him
pay'd.

Assumpsit against *B.* upon a Promise supposed to be made by him to pay for Goods delivered by Plaintiff to *A.* *Holt* took this Difference; if *B.* desires *A.* to deliver Goods to *C.* and promises to see him paid, there *Assumpsit* lies against *B.* tho' in that Case he said at *Guild-hall* he always required the Tradesman to produce his Books to see whom Credit was given to. But if after Goods deliver'd to *C.* by *A.* *B.* says to *A.* you shall be paid for the Goods; it will be hard to saddle him with the Debt.

Jury.

Per Cur'; if Jury eat and drink before giving their privy Verdict, if it be not at Charge of Party for whom Verdict passes, it shall not be Cause to set aside the Verdict.

Perem-

Peremptory Rule never ought to be put upon one without Notice.

Rule not to be peremptory without Notice.

Kilbey versus Weyberg.

ONE Attorney having promised to accept a Declaration from another, was compell'd, upon Motion and Affidavit of the Fact, to do it.

Attorney.

King versus Mayor, &c. of Exeter.

IT was held by Court, that a Writ of *Mandamus* ought to be deliver'd to him that is to make the Return, and that is the Mayor in this Case.

Mandamus to be delivered to him who is to make the Return.

Per Holt; by Course of Court, one bound to keep the Peace ought to continue upon his Recognisance for a Year.

Per Holt; upon an old Issue there ought to be two Terms Notice of Trial.

King versus Fox.

INDICTMENT for exercising a Trade, not having served to it the Space of seven Years, *infra Regnum Angliæ aut Walliæ*, and quash'd for this Exception, for it should be *aut Walliam*.

Indictment for exercising a Trade, not having serv'd thereto.

If Overseers of Poor, being conven'd before two Justices to make their Accounts, do refuse, the Remedy is to appeal to Quarter-Sessions: *Per Cur'*.

Overseers.

Anonymous.

ACTION against Master of a Ship for imbeziling Goods he had on board, and he was held to special Bail; but if it were for negligent keeping, common Bail would have done: *Per Holt*.

Bail Special or Common.

Beal, an Attorney of the Court, sued in the Sheriff's Court for his Fees; and upon Motion he was forced to refer it to the Court.

Attorney's Person under the Power of the Court.

to Master, for that his Person is under the Power of the Court.

Machill versus Malton.

5 Mod. 450.
Salk. 549.
Carth. 475.
A Man may
be sued out of
a Diocese for
Subtraction of
Tithes with-
in it.

M. Had occupied Lands in the Diocese of *York* for seven Years before, and had lived all his Life at *Lincoln*, and at End of seven Years being in the Diocese of *York*, as Evidence, he was served with a Citation for Subtraction of Tithes of those Lands: Now Serjeant *Genner* moved for Prohibition upon the Statute of 23 H. 8. c. 9. against Citations out of Diocese, and quoted 13 Rep. 6. *Palm.* 488. *Hob. Jones v. Jones*, 1 Ro. Rep. 328. 2. Executor in several Dioceses cited in one, Prohibition lies. If Executor be to pay Legacies in another Diocese, where there are no *bona Notabilia*, the way is to transfer the Will thither, where Legatee lives. *Godbolt's Reports* 191. 2 *Brownl.* 12.

Of the other Side were urged *Jeffrey's Case* 5 Co. and *Hard.* 421. Doctor *Blackman's Case*: And he quoted an anonymous Case about five Years before in this Court, where Executor being in a Diocese, where out of his own, but where Goods lay, was denied a Prohibition, because citable in respect of the Locality.

Holt: Question is whether an Inhabitant of Diocese of *Lincoln* be citable at *York*, for Subtraction of Tithes there; and he said that if Will be proved in Prerogative Court, let Executor be where he will, they of Prerogative shall compel him to pay Legacies: And that the Mischief which occasion'd the Statute of H. 8. was, that the Prerogative Courts of *Canterbury* and *York* used to cite Subjects of all Parts of *England*; and that if Sentence be in Admiralty of *France*, they will transmit it hither, and Admiralty of *England* will execute it. And so is the Usage of Civil Law; but here they granted a Prohibition, because it was a doubtful Case, that it might be settled. And it was said at the Bar, that the Canon Law does not take Notice of Locality, but that with them all Things are transitory, and therefore they might proceed in this Case in Diocese of *Lincoln*.

Note; In this Case *Hill.* after, upon Deliberation *per tot' Cur'*, Consultation was awarded: *Vide* the Words of 32 H. 8. c. 7. that Party shall be sued before the Ordinary of the Place where the Subtraction was.

Piper versus Dennis.

UPON a *Quo warranto* against the Town of *Liskardy* in *Ca. 2.* Time, they surrender'd their Charter, which was not enroll'd till King *Ja. 2.* who in Consideration of the Surrender granted a new Charter to them. It was held *per Cur'*, that the second Charter, being in Consideration of a void Surrender, was also void. And where by the Charter surrendred none could be Mayor, if he were not a capital Burgefs; and one was made a capital Burgefs by the Charter of King *James*, and after made Mayor according to the old Charter: Question was started whether he were a legal Mayor. *Holt & Cur'* said, you should first have moved him from being a capital Burgefs, for if we find one in actual Possession of an Office, we shall intend him to be rightful Officer till Contrary appears; as if *merè laicus* be presented, &c. to Benefice, we shall take him for a Clerk till first Steps be annulled.

Vide Alton Woods Case, and Berwick's Case; *Et ant.* p. 247. Person in Possession of the Office of Mayor shall be deem'd legally so, till Contrary appears. Post. Trin. 12 W. 3. Lord Francis.

Morrice versus Green.

IN Trespafs for Assault and Battery, upon Demurrer tendered by Plaintiff, without any Impar lance, the Judgment was thus, *et præd. G. non venit*, &c. and *Carthew* moved, that this was a Judgment by Default, when it should be *nihil dicit*; for a Default cannot be without Impar lance, for without Impar lance he was not demandable, and the Entry should be, *et dictum fuit per Cur' quod jungat ad morationem, et ipse nihil dicit*, &c. And this is manifest from the constant Practice in Case of common Recoveries, where the Judgment is ever by Default; and therefore they are forced to grant a general Impar lance; by which Suit is put in Sufpence, and then Defendant is demandable.

Whether on Demurrer tendered without Impar lance, *Non venit* is a Judgment by Default, or on *Nihil dicit*.

Northey contra. It is a Judgment upon *nihil dicit*, and *non venit* must be understood *non venit ad jungendum in moratione*; and *Holt* inclined that way, but said, they would not be positive: And he said, that upon a *Nihil dicit* one shall never take Advantage of ill Pleading, because there is no Issue in Law, but upon Joinder in Demurrer otherwise.

Anonymus.

Scire Facias
against several,
where one
dies, and one
escapes.

JUDgment against several Defendants, and a *Capias*, and a *Cepi Corpus* returned as to one; then another of Defendants dies, and he that was in Execution escaped, and a *Scire Facias* against the Survivor, the Tertenents of the deceased, and him that had escaped; and *Per Cur'*; it may well be; but *first* the *Scire Facias* ought to suggest that he had escaped: And *secondly*, it ought to be *de Terris et Tenementis* of the Tertenants of deceased; and *de Terris et Tenementis, et bonis, et catallis* of the Survivors.

Parker versus Flint. Trin. 9. W. 3. rot. 363.

A House for
Boarders and
Lodgers, for
themselves and
Horses, not
an Inn or Ale-
House.

BY the Statute of 4 & 5 W. & M. intituled, *An Act for carrying on a War with France*, it was enacted, that Constables should quarter Soldiers upon Inn-keepers, and such as kept Alehouses and Victualing Houses, Livery Stables, or sold Brandy, Metheglin or Cyder by Retail; and in an Action brought by the Plaintiff against a Constable for quartering a Horse and Dragoon upon him, he pleaded Not guilty, being an Officer, and gave the Statute in Evidence: And Jury found, that there are wholesome Wells at *Epsoin*, and that the Plaintiff, during the Season for drinking the Waters, indefinitely *demisit conclavia, Anglice* let Lodgings, to such as went thither to drink the Waters, for the Air, or for their Pleasure; and did dress Victuals for them, and sell them Ale and Beer, and entertained their Horses at 8 *d. per diem*, but sold no Victuals, Drink, &c. to any but the Lodgers; and that Plaintiff had no License from any Justice of Peace to sell Ale, and that the Defendant did billet a Soldier and a Horse upon the Plaintiff, who compelled him to find Victuals for himself, and Provision for his Horse, for the Space of two Months; *et si, &c.*

Resolved *Per Cur'*, that Plaintiff's House was not a House within the Description of the Statute; for *1st*, it was no Inn, for Verdict finds he let Lodgings only, which shews him not compellable to entertain any body, and that none could come there without a previous Contract; that he was not bound to sell at reasonable Rates, or to protect his Guests; but contrary it is in all the said Points in Case of Inn-keeper, and Action shall lie against him for Default, not by Name of

of *Hospitat'*, but of *communis Hospitat'*. *Vide Reg.* 105. Mo. 877. *Hetly* 49. *Fitz.* tit. *Hoffler. Bro. Action sur Case* 76. 5 *Ed.* 4. f. 2.

2dly, It is not an Ale-House or Victualing-House, for those extend only to such Ale-Houses and Victualing-Houses as are known and described by several Acts of Parliament, which it is a Crime to keep without License; and it must be a *Communis taberna*, wherein Drink, &c. is communiter sold to all the King's Subjects. *West's Presidents* 71. *Lamb.* 340. 1 *Jac.* c. 9. and the Verdict finds they only sold to Lodgers.

3dly, It was resolved to be a Statute against Liberty of Subject; for before it no Man was obliged to entertain Soldiers against his Will, as appears by the Petition of Right, *tertio Car.* and the Statute of 21 *Car.* 2. and therefore not to be construed favourably without great Necessity.

4thly, That in this Case, the Constable having wrongfully quarter'd a Dragoon upon him, he was answerable for all the Dragoon had committed.

Constable
wrongfully
quartering
Soldiers, to
answer all the
Damage.

Note; In this Case *Holt* held, that if one comes to an Inn, and made a previous Contract for Lodging for a set Time, and does not eat or drink there, he is no Guest but a Lodger; and as such is not under the Inn-Keeper's Protection; but if he eats and drinks there, it is otherwise; or if he pays for his Diet there, tho' he does not take it there. And a Sign is not essential to an Inn, but is an Evidence of it.

Note likewise, it was said by *Wright* Serjeant, that an Inn-Keeper can't sell Ale indefinitely without License, *Dalton's Just.* 32, 33. and Inn-Keeper as such cannot be a Bankrupt, because he does not sell but utters his Provision. 1 *Cr.* 548, and *Jud. pro Quer'*

King versus Beechcroft.

AN Indictment for Extortion against an Officer for taking Money for not carrying his Prisoner to a Spunging House; and Court looked upon it to be so ill a Practice, that they would not hear a Motion to quash it.

Indictment
for Extortion
not quash'd on
Motion.

If Rules of Pleading be not delivered, tho' Declaration be of another Term, yet *Venue* may be changed: *Per Cur'*.

Holt :

Holt : It is against the Trust reposed in the Court to let Judgment be entered of another Term than it is given; and it would be an intolerable Mischief to Men's Estates.

Constable not discharged till new one sworn.

An Order for making a Constable quashed, *absente Holt*; for that it did not appear by the Order that he was an Inhabitant of the Liberty, tho' of the Parish. The late Constable is not discharged till the new be sworn; because the Parish cannot be without an Officer.

Ashton versus —, at Nisi prius.

Keyl 113. Where Persons are doing an unlawful Act, if Murder ensues, all are guilty. Keyl. 66. & nota bene diversitatem.

TWO, three, or more are doing an unlawful Act, as Abusing the Passers-by in a Street, or Highway, if one of them kills a Passer-by, it is Murder in all; and whatever Mischief one does, they are all guilty of it; and it is lawful for any Person to attack and suppress them, and command the King's Peace; and such Attempt to suppress is not a sufficient Provocation to make Killing, Manslaughter, or son Assault demesne a good Plea in Trespass against them: *Holt*.

Per Holt: If *A.* employs *B.* to work for *C.* without Warrant from *C.* *A.* is liable to pay for it; and Executor is not liable to pay for Funeral Expences, without he contracts for it.

Fanshaw versus *Harris*.

Day of the Date.

POLICY of Insurance was, that Defendant undertook to pay the Plaintiff 100*l.* if Sir Robert Howard did live a Twelve-month from the Day of the Date of the Policy, being the 3d of December 1697. and he died the 3d of December 1698. and *Holt* directed the Jury to find for Plaintiff. And he said, if a Man be born on the 3d of December, and die the 2d of December twenty Years after, making a Will on that Day, it would be a good Will.

Information for a Rescue in the Park.

Information was filed against *Fourdan*, Ensign of the Guards, for rescuing one arrested by C. J.'s Warrant in the Park.

Beckman's Case.

HE was personated as Bail in an Action; and *Northey* moved to vacate the Record upon *Affidavit*, which did not make the Fact clearly out. *Holt*: If it had manifestly appeared to be a Trick, we would relieve you; but the Case being doubtful we cannot vacate the Record, but you may have your Action. *Northey*: Then you will then order by Rule, that we may plead it to a *Sci' fac'* against us, according to 2 Cr. 256. but *negatum fuit*.

Where Bail is personated. Record may be vacated.

Anonymus. In Communi Banco.

Motion was made for an Attachment for Non-performance of an Award; and *per Cur'*, there must be a positive *Affidavit* of personal Notice of Award, and Demand of the Money all at one Time, because it brings Party into Contempt; but if Party keeps out of the Way on Purpose, there must be an *Affidavit* thereof, and of Endeavour used to find him out, and serve him; and it is but of late that Attachments have been the Means to compel Performance of Award; but the old Remedy was Case.

Award. On Non performance of Award, must be *Affidavit* of personal Notice; and *vide postea Mich. 11 W. 3. King v. Tooley.* Demand of the Money before Attachment.

Neal versus Spencer.

CASE for arresting Plaintiff without Cause of Action: And *per Cur'*, Action lies not, if it be not that he was held to excessive Bail; and of that Opinion is *Hale* and *Vaughan* against *Hob.* and *Levinz* at the Bar said, he knew it adjudged in my Lord *Hale's* Time, that Action would lie for arresting one, *ubi nihil debuit vel saltem non tantum*, and holding him to excessive Bail. And *Treby C. J.* cited *Reeve's* Case soon after the Restoration, where it was held by the Judges, in Opposition, as he believed, to *Oliver's* Judges, that it would not lie for Arresting without Cause, and holding to special Bail, but contrary had been adjudg'd since; and *Jud'* here *pro Def'*. An Exception had been taken to the Declaration, that it was *quod cum, &c.* and *Powel* said most of the Precedents in Case were so; but without Doubt it would be bad in *Trespass*; and *Blinckow* and *Treby* said they could see no Difference.

Case for Arresting without Cause of Action will not lie, unless he be held to excessive Bail.

Postea Hill. 11 W. 3. Robins v. Robins.

U u u

Walker

Walker versus Walker.

Ante p. 69.
General *In-*
debitatus will
not lie for Mo-
ney won at
Play.

Mich. 3 W.
& M. Rot.
610.

Nota hoc; vide
postea Mich.
11 W. 3.
Crouch's Case.

I*Ndebitatus Assumpsit* generally for Money won at Play, and Verdict, and general Damages; and moved in Arrest of Judgment, that it would not bear an Action upon the implied Consideration of Winning or Losing, without more special Words, and it being for Play, it is no more than a *Nudum pactum*; vide *Jackson and Colegrave's Case*, 1 Sid. 394. 2 *Vent.* 175. adjudg'd *Indeb'* would not lie on such a Promise implied. And *per Cur'*, in Case of Play upon Tick there must be a special mutual Promise; but it has been held, that upon Evidence they need not prove a special mutual Promise, because the Nature of the Thing implies one, but it must be set forth in Pleading; and *per Cur'*, the Statute shall be construed largely in Odium of Gamesters; and therefore if one lost upwards of 100 l. to two, at one Sitting, both the Sums would be void: But if one lose 99 l. to A. and then on Purpose to avoid it loses 20 l. to B. there A. may specially set out the Fraud, and so avoid it. *Jud' pro Def'*.

D E

Term. Sanct. Hill.

Anno 11 W. III. in B. R.

Wiggan versus Branthwaite. Hill. 10 W. Rot. 332.

TRespafs for taking Goods. The Case was: The Abbot of *Broomhall* was seised in Fee in Right of his Monastery of the Manor of *Broomhall*, and had Wreck by Prescription: The Manor by the Dissolution of Monasteries came to King *H. 8.* by which the Wreck, being a Royal Franchise, vested in him *jure Corone*; and being so seised grants the Office of High Admiral of *England* to the Lord Viscount *L'Isle*, with all Wrecks at Sea, and all other Profits to the said Office belonging; and after this he grants the Manor, &c. to *B.* under whom the said Plaintiff in the Action claims; but, as the Counsel for the Defendant urged, the Wreck being granted to the Lord *L'Isle* before, and not recited in the Grant to *B.* it did not pass by the Grant of the King to *B.* and therefore the Plaintiff had no Title.

A Manor to which Wreck belong'd by Prescription came to the King's Hands, who granted to *A.* the Office of Admiral, with all Wrecks at Sea, and all Profits to the said Office belonging; this does not pass the Wreck appurtenant to the Manor.

But *Holt* over-ruled this on Evidence at Trial in *Suffolk*, that the Wreck belong'd to the Manor by Prescription, and could not pass as appurtenant to the Office of High Admiral; and it being moved to have it found specially, it was refused; and a Bill of Exceptions was tendered and sealed, and a Writ of Error brought, and Error assigned; and it was argued by *Hawles* Solicitor General and *Whitaker*, that besides the Grant of Wreck appurtenant to the Office of High Admiral, there is also a Grant of *Maris Ejecta*, which is not relative to the Office, and will comprehend a Grant of all Wreck then in the Hands of the King; and the restraining Clause of *eidem spectant' & pertinent'* shall not relate

relate to the Wreck of Sea granted; for Wreck cannot belong to the Office by Prescription, for the Office it self is within Time of Memory. But *per Holt*, Wreck may be claimed by Prescription, and may belong to the Lord Admiral by Prescription; for the Lord Admiral's Office is an antient Office, *tempore dont*, tho' it might not be vested in a single Person, or in the same Manner, as it is now. *Dy. 152. b.* there is a Prescription for the Lord High Admiral to grant the Office of Register of the Admiralty for Life; and he made no Doubt, but some Wreck might belong to the Admiral by Prescription; as that about the *Cinque Ports*, and such Places where he was most conversant in antient Time: And as to the Objection, in regard that there is but one *Concessit*, or Word of Grant, all the Clauses shall be taken to be dependant on it, and the Clause of Restraint shall extend to all of them; otherwise if there had been any Word of Grant intermediate; and Judgment was affirm'd.

Pollard versus Atker.

Where Custom is denied, Suit cannot be in Spiritual Court for any Thing except Pension.

Libel in the Spiritual Court by Clark of a Parish, for 4d. *per Annum* due to him by Custom from every Master of Family in a Parish; Defendant denied the Custom; and Prohibition granted, *because Custom not triable there*, except in *Case of Pension*.

The Inhabitants of Kings-Langly versus Inhabitants of St. Peter's in St. Albans.

Sessions may adjourn Matter for further Debate.

EXception was taken to an Order made at the Quarter-Sessions; because that the Appeal was lodged at the next Quarter-Sessions, and it appears on the Face of the Order, that it was not then determined, but was adjourn'd over for further Consideration; and it was held by the Court, that one must Appeal to the next Quarter-Sessions; yet it may be adjourned over on Debate for further Consideration; and it was confirmed.

Lacy versus Williams. Mich. 10 W. 3. Rot. 586.

ERROR of a Judgment given in *C. B.* in Ejectment; and a special Verdict was found, viz. that *W. Lacy* the Younger being Tenant in Tail Male in 7 Nov. 2 W. & M. *G. Keith* sued out a Writ of Entry *sur Disseisin* of the Lands in Question against *Miles Corbet*, returnable *quind' Martini*; at which Time *Miles Corbet* appeared and vouched *W. Lacy* the Younger, who was not present in Court; upon which a *Summoneas ad Warrantizandum* issued, *Teste* 28th of Nov. 2 W. & M. returnable *Octab' Hill.* after; after the Issuing forth of which Writ, and before the Return of it, *W. Lacy* the Younger, by Lease and Release 1 & 2 Jan. conveyed the Lands to *Miles Corbet* to make him a compleat Tenant to *Præcipe*: * *Miles Corbet* appeared at the Return of the Summons *ad Warrantizandum*, and entered into the Warranty; and a Recovery was had, to the Use of *William Lacy*, and his Heirs; afterwards he died without Issue Male, leaving the Lessor of the Plaintiff, his Daughter and Heir, and the Defendant claimed as Brother and Heir in Tail Male. And the single Question was, if this common Recovery, in which there was no Tenant to the *Præcipe* when the Summons *ad Warrantizandum* issued, but made pending the Writ of Summons, and before the Return, be good; and it was argued in the *K. B.* *per Pratt pro Quer'* in Error, and *Keen pro Def'*; and Judgment was affirmed: For *per Holt*; *The general Rule is, if a Man gain the Freehold after the Writ purchased, and at any Time before Judgment, this makes the Writ good; for why should the Recovery be bad, but because it is against a Man who had nothing at the Time of the Recovery had? but here he has. In a Sci' fac' against Tertenants, after a Recovery they ought to plead, that the Tenant had nothing in the Land die impetrationis brevis, nec unquam postea, and without that it is ill. If the Vouchee comes in and counterpleads the Voucher, per Non-tenure of the Tenant, he ought to say, Die impetrationis brevis, nec unquam postea; so if the Tenant pleads Non-tenure in Abatement: But if the Tenant comes in by Act of Law, pending the Writ, as by Descent, he ought to plead specially; and as the Writ is made good by a subsequent Purchase, so the Voucher is made good by a subsequent Entry into Warranty by Vouchee; so there is a good Tenant, a good Vouchee, and a good*

Common Recovery,
Salk. 568.
Carth. 472.
If Tenant gain the Freehold any Time before Judgment, 'tis good.

* *W. Lacy.*

X x x

Recovery

Recovery. And as to the Cause of Action, the Demandant may have good Cause of Action, tho' the Tenant has not the Lands; for the Right of the Demand is the Cause of the Action; and therefore, if the Tenant has the Land to tender before the Judgment, it is good. *Jud' affirm'.*

King versus Sudbury, Heaps, & al'.

If all except two are acquitted on a Riot, Judgment cannot be had; *aliter* if is *cum multis aliis.*

THE Defendants were indicted, for that they *riotosè & routosè* *assemblaverunt*, and so assembled committed a Battery on *Mary Russell*; two of them were found guilty, and all the others were acquitted; and Judgment was arrested, for two cannot commit a Riot; but *per Holt*, if the Indictment had been, that the Defendants, with divers other Disturbers of the Peace, had committed this Riot, and Verdict had been, in this Case the King might have Judgment.

Jeveson versus Moor. Hill. 9 W. 3. Rot. 430.

Salk. 15.
Carth. 451.
Case for Stop-
ping a Way
leading to his
Colliery, *per*
quod he lost,
&c.

CASE. Plaintiff declared, that he was possessed, for a certain Term of Years yet to come, of a certain Colliery in *Dale*, near the Highway leading from such a Place to such a Place, & *sic retrorsum*, thro' which his Customers used to come and go, to take and carry away the Coals dug out of his said Colliery; that the 14th of *March 9 W.* he had 200 Loads of Coals there dug ready for Sale; and that the Defendant, intending to hinder the Plaintiff of the Benefit of his Colliery, and to seduce the Customers from the Plaintiff's Colliery to a Colliery of the Defendant's near adjacent, after the 14th of *March*, and before the Action brought, laid six Cart-loads of Stones and an Ash-Tree athwart the said Highway at *Dale*, within the two Bounds aforesaid, and continued them there for two Months; *per quod* the Plaintiff lost the Profit and Benefit of his Colliery, and also the Coals lying on the Ground were much damaged, *pro defectu emptorum ex causa prædicta sic impedit' & obstruct'.* On Not guilty, Verdict *pro Quer'*; and upon Motion in Arrest of Judgment, a Rule made *Cur' adv' vult* indefinitely: The Court argued *seriatim*; and 1st, they all unanimously agreed, that this being in a Highway, and consequently a Publick Nuisance, no Action would lie for it, generally speaking; but if any Person had a particular Damage, which would distinguish his Case from that of all the

the rest of the King's Subjects, they held an Action would lie for him, if he laid his Damage specially enough to support his Action; and *Gould* and *Turton* held the Plaintiff had done so here, especially it being after Verdict.

Gould: This Declaration is special enough, even upon Demurrer, *a fortiori* after Verdict. Indeed if Plaintiff had only said, *per quod* his Carriage could not pass that Way, that had been bad; because that is a common Damage with the rest of the King's Subjects; and at that Rate, every one that had Occasion to pass that Way would have his Action; which would beget such a Multiplicity of Actions, as the Law will not indure: But here he says, *per quod* he lost the Sale of his Colliery; and that is special. 1 *Rol. Ab.* pl. 8. 7 *H.* 7. 3. *Godbolt* 343. Stopping of a Way may be a general or special Damnification; and the Question is here, whether the *per quod* has done its Office. But it is an Objection, that it does not appear that the Plaintiff lost any Buyer. But I answer, that when a Man lays a special Damage to maintain his Action, he need not many Times set forth the precise Certainty thereof; as if Master bring Trespass for Beating his Servant, he cannot recover if he does not shew a special Damage, as Loss of Service; yet he need only say *per quod* he lost his Service *per magnum tempus*, and that is well enough; for the *Quantum* of Time there is not traversable. 1 *Leo.* 136. *Hob.* 284. 9 *Co.* 53. In Action for a private Nuisance, the Plaintiff concluded *ad nocumentum* of his House, without shewing *coment*, and good; for it is to recover Damages only: So here it is not necessary to instance who the Buyers were; for it appears 1st, the Coals were there ready for Sale. 2^{dly}, That the Way was stopped, whereby, &c. There is a Difference where the Damage is the Result of one single Instance, as Loss of Marriage, which cannot be but to one single Person, there it ought to be ascertained who that Person was; but where the Damage is complicated of many Instances, as here, it is otherwise; and it would be inconvenient if it were not; for it might be impossible to tell who his Customers were to have been; and if he had named some, and failed in the Evidence of proving a Loss of any of them, he must have been nonsuited; and he would be so restrained to them mentioned in the Declaration, that he could give Evidence of none other. But it is otherwise on Indictment for Barretry; you may give more or less Particulars in Evidence than you have mention'd; because that only raises or lessens the Fine, but here it is to have Damages from a Jury. 2^{dly}, This is against

gainst a Wrong-Doer; in which Case this general Way of declaring has prevailed in all the Courts in *Westminster*; for there it is not necessary to make a Title to Plaintiff further than generally, that he was possessed, &c. As for Depriving one of his Common, *vide* 9 H. 6. 43, 45. 27 H. 6. 1. 1 Vent. 274. Trin. 27 Car. 2. Rot. 1501. 1 Rol. Ab. 63. pl. 31. 1 Cr. 510. 11 H. 4. 44. b. Hill. 8 W. 3. Rot. 316. in C. B. Baker and Moon; and so is Hart and Basset's Case, 2 Jones 156. Allen 22. 1 Leo. 236. Style 107. 1 Vent. 13. Eating Grass *cum averiis*, good, without more.

Turton: Action will not lie without special Damage; Br. Action sur Case 6. Nuisance 1. Cr. El. 664. 5 Co. Williams's Case. Vaughan 335, 340, 341. 9 Co. Mary's Case. 2 Cr. 446. 1 Rol. Ab. 888. 1 Inst. 56. Keb. Mennell and Saltmarsh's Case. 2dly, If special Damages be sufficiently alledged, *Quantum* of them not material. 1st, Here it appears Plaintiff had a Colliery exposed to Sale. 2dly, That this was the Way through which his Customers used to come and go. 3dly, That Defendant *malitiosè*, &c. did stop this Way. 4thly, That Plaintiff thereby lost the Sale of his Coals; and he relied upon 1 Rol. Ab. 104.

And he said Verdict would aid it at all Events; and for Defects cured by Verdict he quoted 1 Keb. 847. 2 Saund. 250. 1 Vent. 114, 126. Jo. 125, 232. 1 Rol. Ab. 63. 2 Cr. 565. Cr. Car. 510. 1 Rol. Ab. 88.

Rookby: This Action will not lie without special Damages for two Reasons; 1. Because it is a general Injury to the whole Body of the Kingdom, and therefore the Action is given only to the King, who is the Head. 2. Because of the Multiplicity of Actions that would insue, if every one might have an Action that is stopp'd of this Way. But when Action is upon the special Damage, they ought to be so certainly alledged, as that the Court may be satisfied that it is a special Damage; and here if the (*per quod*) had been omitted, it had been undoubtedly bad, for that had been but a general Injury; and tho' the *per quod* seems to have two Things, *viz.* the Loss of the Sale, and also the Lessening the Value of the Coals; yet in Truth all is but one, *viz.* the Loss of the Profit of his Colliery. If there had been a sufficient Cause of Action without the *per quod*, the uncertain laying Damages under the *per quod* will not vitiate; it is not said, that any particular Person intended to buy, and by Reason of this Stopping forbore it; and he compared it to the Case in 3 Bulstrode 75. where Plaintiff had laid in his Declaration, that he purposed to settle Land upon

upon his Son, and to let Part to Tenants; and that Defendant did Slander his Title, whereby, &c. and Judgment arrested, because he had not shewn in certain any who had forborn being his Tenant upon that Account; and suppose the Case of *Hart* and *Bassett* to be Law, it is not like this; for there was an actual Damage *in presenti*, but here is only a potential Damage; because it may be the Customers would not have come, if the Way had not been stopp'd; or if they had come, it may be he had not agreed of the Price with them. But it is objected, they could not name their Customers, because they could not know them. *Answer*: It is for that Reason they ought not to have Damage, because they do not know what Damage it has done them; and they would have recovered something for perhaps nothing.

Holt C. J. The Action will not lie generally. But two Questions are in this Case; 1st, Whether Plaintiff may have this Action in this Case generally, in respect of the Proximity of his Colliery to the Highway. 2^{dly}, If special Damage be so laid as to maintain the Action. As to the first Action will not lie for the Proximity; for tho' the Way be more convenient for him, than to others of the King's Subjects; yet he has no more Right to the Way than the Rest of the King's Subjects, and therefore no more intitled to Action for the Stopping generally than another; and this is the Reason of *Finiaux* and *Hovedon*, 3 Cr. 664. Every Man that brings Action for an Injury, it must bear Proportion to the Right which he has; as where one has Common belonging to his House, or Ground, or a Way to his House, or Ground. 2 *Saund.* 115. *A.* seised of a Mill in a Town, and *B.* seised of another Mill in the same Town, and a Prescription, that Inhabitants should come to one or the other of the Mills, as they pleased, if Inhabitants come to neither, they both must join in the Action, in respect of the Right which is in Common; and Action must always be managed according to the Right; and this Highway was made for all the King's Subjects.

2^{dly}, There is no particular Damage; for the Offence is Stopping the Highway; and if the Defendant had been indicted for this, the Indictment would conclude *ad commune nocumentum omnium subdit' Domini Regis per illam viam transeun'*; and without Doubt the Count would have been bad without the *per quod*; and it is not like the Case put by my Brother *Gould*, of diverting a Water-course from a Mill; for the Plaintiff had a particular Right in the

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Water-

Water-course to his Mill; and so was the Case of *St. John* and *Moody*; it was for Stopping a private Way, and the *per quod* did not make the Gift of the Action: But in all general Nuisances, where the Action is particular, the *per quod* makes the Gift of the Action; and there it must be made certain. And the Case of 27 H. 8. is Law, if rightly understood; that is, Action will lie according to *Fitz.* if special Damages be laid, as it was not in that Case; and according to *Baldwin*, it will not lie without special Damage, as that Case was; and so is 1 *Inst.* 56. And the special Damage must be more than Hindrance of Passages; as Falling in, breaking Hand or Leg, &c. and I always understood it so.

Obj. He lost his Customers, and that is particular. *Answe.* Such a Precedent overthrows all the Books, that agree Damages must be specially alledged: For the Damages must support the Action; and therefore they must shew some particular Customer whom this Stopping hinder'd to come. As to the Case in 1 *Rol. Ab.* 63. it were in Point, but I always heard it denied to be Law; and the same Author in his Reports 56. *Fell* and *Brewer's* Case, says, that Loss of Customers is no special Damage in such a Case; but where Words, &c. in themselves are actionable, such an Allegation with a *per quod* is good, in Aggravation of Damages. 2 *Rol. Rep.* 79. 1 *Rol. Ab.* 36. 1 *Cr.* 140. 2 *Bulst.* 276. where one was said to be Incontinent, whereby none would marry him, and not good; but he should name somebody who refused upon that Account; and no Diversity between the principal Case, and Action for Words which in themselves are not actionable; for in both Cases there must be a special Damage; and this is like the Case of *Paine* and *Parterick*, 3 *Mod.* 289. and *Menel* and *Saltmarsh*, 1 *Keb.* 847. The first Case was thus; there was a Town which maintained a Wherry for all Passengers paying Toll, and a Custom, that the Inhabitants of the Town should pass *gratis*; and the Person, whose Ferry it was, gave over keeping it, against whom one of the Inhabitants brought his Action: The Custom was adjudged good, but held the Action would not lie, but Defendant was only punishable by Indictment; and that there was no more special Damage to Inhabitants of the Town than to any other, by the Cesser of the Ferry, *viz.* the not Passing; and that Passing free was only consequential. And in the Case of *Menel* and *Saltmarsh*, the Corn was rotten, because he himself could not bring it home; and the Case of *Hart* and *Basset* is a weak Case; but still the Declaration there was better than this; for it

appears the Plaintiff was a Farmer of 'Tithes, and was liable to an Action if he suffer'd the Tithes to lie on the Land beyond a convenient Time; and that he was also put to great Expence. If an Action be made maintainable for such imaginary Damages, it would overthrow the Maxim in Law, *That an Action does not lie for a common Nuisance*; and if Plaintiff cannot tell whose Custom he lost, he cannot shew he lost any Thing; and the Action is always in lieu of the Loss.

Then the Question was, the Court being thus divided, how Judgment should be; and *per Holt*, if the Division had been on the first Motion in Arrest of Judgment, before any Rule made, the Plaintiff must have had Judgment; but here is an *Advisare vult* indefinitely, and so Judgment can't be entred without Continuances; and while the Court is divided, it continues an *Advisare vult*. If the Rule had been temporary and expired, the Matter had been at large; but he said a Writ of Error lay, and therefore there must be Judgment one way or other; but let it stay, *et sic pendet*. Judgment was stayed. But in the Case of *Philips and Ryand*, Pasch. 11. G. 1. the Chief Justice said it was reversed by the Opinion of all the Judges in *Exchequer Chamber*.

Grant versus Burton.

SCire Facias against Bail, who plead no *Cap.* issued against the Principal; Plaintiff replied, that there did, *prout patet per Recordum* in this Court, and prays that the Record may be inspected: Defendant demurs *quia male conclusit* his Replication; and it was moved for the Plaintiff, that Demurrer might be set aside, because Defendant tendered an Issue, and Plaintiff join'd with him, and Pleadings were at an End; and nothing remained but to inspect the Record; *quod cur' concessit*, and the Demurrer was set aside.

After Issue joined, cannot reply *prout patet per record*.
Ante p. 215.
Postea Pasch. 12 W. 3.
Creamer v. Wickett.

Harvey versus Williams. Hill. 10 W. Rot. 160.

IN *Indebitat' Assumpsit*, the Defendant pleaded *quod ante Exhibitionem Billæ* the Plaintiff became a Bankrupt, whereby he became unable to discharge the Defendant, because the said Money, from such Time as he became a Bankrupt, was due to such Creditors as should sue out a Commission; on Demurrer Judgment *pro Quer'*, for this is no Plea.

On *Indebitatus Assumpsit* Plea, that committed an Act of Bankruptcy, ill.

King

King versus Harris.

Carth. 496.
Salk. 260.
On forcible
Entry, Resti-
tution granted
after three
Years set aside.

AN Inquisition of forcible Entry into the Rectory of *Lan-
triceant* in *Glamorganshire* was taken the eighteenth
of *October 7 W. 1695*, and Restitution presently granted,
which was soon after set aside by a *Vi laica removenda*; and
tenth of *December 1691*, a new Restitution was granted, on
which the Inquisition was removed by *Certiorari* into *King's
Bench*, and several Exceptions taken to Inquisition. 1st, That
it was *Presentatum extitit* in the Preterperfect Tense. *Holt*:
That would be fatal if *Extitit* were necessarily in the Preter-
perfect Tense; but there is an old Verb called *Extito* which
may have *Extitit* in the Present Tense. 2^d was to Caption,
which said, they *jurat' et onerat'*, but does not say *with
what*; and this stuck with Court. 1 *Sid. King versus Faulker
and Chaloner and Chaloner*. And it was resolved, that a
Vi laica removenda could only remove the Force, but not
meddle with the Possession: But then it was further strongly
objected, that the second Restitution upon Inquisition was ir-
regularly obtained, because the Justices of the Peace had
executed their Power, by putting the Party into Possession im-
mediately after the Inquisition taken, and could not grant a
new Restitution afterwards: But *per Holt*; if Possession be deli-
vered upon *Habere facias Possessionem*, or Grant of Restitution,
and it is avoided immediately by a new Force, there the Party
may have a new *Habere Facias Possessionem*, or Grant of Re-
stitution; but if after the Restitution awarded, the Party en-
joys quiet Possession, and he be removed by a new Force,
there he ought to resort to a new Remedy. 2^{dly}, It was argu-
ed that the Grant of the second Restitution was not good, be-
cause it was not granted in convenient Time; for the Intent
of the Statute of *H. 6.* was to give speedy Remedy; or at
least after such Delay, as there has been here, there ought to
be some Process to renew the Inquisition, upon which the
Party might come in and shew what he can say why Resti-
tution should not be granted; for the Possession might have
become lawful by subsequent Conveyance; and this is agree-
able to the Reason of the Law; for in personal Actions after
a Year and a Day, at common Law, the Party could not
have Execution upon any Judgment, but was to put his Ac-
tion of Debt on his Judgment, till the Statute of *W. 2.* gave
him a *Scire Facias*; and in real Actions he must have a
Scire Facias. In criminal Cases also, if Execution be defer-
red,

red, the Prisoner must be brought to the Bar before a *Rule is made for his Execution*; to which Holt agreed, and cited *Knightley's Case*, who had Judgment of Death for High Treason pronounced against him in *Easter Term*, and Execution was countermanded, and mean while *Trinity Term* past; and there being Orders from above for his Execution, in the long Vacation all the Judges met at *Serjeants Inn*, and it was agreed by them all, that without being call'd to the Bar first he could not be executed. And *Holt* was of Opinion, that if *Trinity Term* had come, tho' not past, it would have been the same thing; and the Court here, after Consideration, were of Opinion that Restitution ought to be granted, by reason of the long Delay, which might be a great Inconvenience and Prejudice to Purchasers; and they grounded this Resolution on *Dr. Bonham's Case*, 8 Co. 119. And *Holt* ordered a special Entry to be made, that because it appear'd on Examination that Restitution was not awarded till three Years after the Inquisition, that therefore Restitution granted to *Harris*.

Keyl. 13.
1 Lev. 61.
acc.

The City of London versus Vanacre.

UPON a *Habeas Corpus* directed to the Mayor, Aldermen, and Sheriffs of *London*, to remove the Body of *Vanacre*, with the Cause of detaining him; they returned, that the City of *London* is an ancient City, and County of itself, and that the Citizens of *London* *temps dont* have been a Body Politick, known by divers Names; and that King *John*, by his Charter, granted to them the Shirevewick of *London* and *Middlesex*, and that they should make out of themselves whom they pleased Sheriffs; that *Magna Charta* and divers other Statutes confirm all their Liberties; and that they have a Custom to make By-Laws; and that if any of them be defective or difficult to be understood, or if any Matter arises for which a convenient Remedy was wanting, that the Common Council may take Orders touching the same. That Time out of Mind there has been a Court of Record before the Mayor and Aldermen in the inner Chamber of *Guild-hall*. Then they return an Act of Common Council, made 7 Car. 1. which repeals all former By-Laws touching the Election of Sheriffs, and appoints that the Election shall be the twenty-fourth of *June* yearly; and if in the Interim there shall be a Vacancy, then at such Time and Place as the Lord Mayor and Court of Aldermen shall ap-

5 Mod 438.
Cart. 480.
Salk. 142.
Custom for making By-Laws to oblige a Person to take an Office, under a Penalty.

Post. Hill.
13 W. 3.
Civitas London v. Wood.

Z z z

point;

point; and that no Freeman of the City so elected shall be exempted from the Execution of the Office, unless he voluntarily take an Oath before the Court of Aldermen, that he is not worth Ten thousand Pounds; and bring six Compurgators with him, such as the Lord Mayor and Aldermen shall approve of, to swear that they believe what he has sworn is true; and that if any Freeman elected Sheriff, and be proclaim'd on the Hustings in the Presence of the Lord Mayor and six Aldermen, or in his Absence before eight Aldermen, shall not come to the next Court of Aldermen, and declare his Consent, and enter into a Bond of 1000 *l.* to the Chamberlain, to appear at the Vigil of St. *Michael*, and to accept the Office; not having a reasonable Cause to be allow'd by the Lord Mayor and Court of Aldermen, shall forfeit 400 *l.* one Hundred to be paid to the next Sheriff that shall hold, the rest to the Use of the Mayor and Commonalty; to be recovered in the Court of Record held before the Mayor and Aldermen. Then the Return sets forth, that the Defendant was chosen and proclaimed, &c. and for his Default, &c. a Plaint was levied, &c.

Holt Chief Justice deliver'd the Opinion of the Court, that the By-Law was good, and a *Procedendo* ought to be granted. The principal Objections against the By-Law may be reduced to four. And the *first* is, that the Subject Matter, concerning which this By-Law is made, is not within the Custom of the City; for the Shireviewick of *London* and *Middlesex* is granted within Time of Memory, and therefore not within a Custom, which is immemorial; and besides, the Shireviewick of *Middlesex* is out of the Jurisdiction of the City, and therefore their By-Law cannot extend to it. As to the first Part of this Objection, that no By-Law can be made about this Franchise, because granted within Time of Memory; I answer, That admitting the Custom will not warrant such a By-Law, yet it may be made of common Right; for of common Right every Corporation may make a By-Law concerning any Franchise granted to them, because it is for the Welfare of the Body Politick, and included in the very Act of Incorporation. *Hob.* 211. 2dly, Every Corporation has a Power to make a By-Law for the better Government of the Place, which is the very Touchstone by which all By-Laws are to be judged: Now, if it be for the Advantage of the King and People to have substantial Persons serve in this Office; this By-Law on that Account is good. 5 Co. 62. the Chamberlain of *London's* Case. An Act of Common Council was made, that all Citizens and Strangers

Of common Right every Corporation may make a By-Law concerning a Franchise granted to them. A Corporation has a Power for the better Government of the Place, to make By-Laws.

gers, who should expose any Cloaths to Sale in the City of *London*, should bring it first to *Blackwell-Hall*; and held a good By-Law both as to the Citizens and Strangers, because it was for the Credit of the Market and publick Good. 3dly, The very Constitution of King *James's* Charter obliges the Citizens to make By-Laws concerning this Election; for the Franchise is not only granted to them, but that they shall choose out of themselves whom they please to be Sheriffs. Now it would be in vain to give them a Power to appoint the Sheriff, if they have not a Power to compel those whom they shall appoint; and the Acceptance of the Charter obliges them to perform the Terms on which it was given: And as every Citizen is capable of the Benefit of the Franchise, so he must submit to the Charge also. 2 *Cro. Bret v. Cumberland*; and he took it that this Franchise is an Advantage to the City, for in King *Charles II's* Time a Surrender of it would have compounded for their Franchise. 4thly, If they do not make such an Election as the Letters Patent appoint, it is a Forfeiture of the Franchise; for all Franchises are granted on Condition, that they shall be duly executed according to the Grant; and if they neglect to perform the Terms, the Patents may be repealed by *Scire Facias*; therefore it is necessary that they have a coercive Power to compel Persons to take the Office upon them without Custom, or else the Franchise would be lost to the City: But admitting it could not be good without Custom, yet he was of Opinion that the By-Law was warranted by the Custom, tho' the Subject Matter of it had its Original within Time of Memory; for general Customs may be extended to new Things which are within the Reason of those Customs, 5 *Co. 82. Snelling's Case*, is an Authority in Point, where, by the Custom of *London*, Executors may pay Debts, *sc.* simple Contracts, in equal degree with Bonds; and adjudged that Administrators were within the Custom, tho' created by 31 *Ed. 3.* within Time of Memory, because within the same Reason. As to the Objection, that he may be indicted for this Refusal, as was the Case of *Larwood Sheriff of Norwich*; *Resp.* That will not be sufficient to hinder the Forfeiture of the Franchise; for if there should be a Refusal when the Sheriff comes to be sworn, then there will be a Vacancy, and an Obstruction of Justice: Besides the Penalty of the By-Law is for refusing to declare beforehand whether he will hold at the Time, which is not indictable, and not for refusing to take Office upon him at the Time. As to the Part of the Objection, that they cannot make a By-Law about

If Charter obliges them to appoint a Sheriff, have a Power to compel the Acceptance.

If do not make Election, it is a Forfeiture of the Franchise.

General Customs may extend to new Things, which are within the Reason of those Customs.

Tho' may be indicted, yet liable to pay the Forfeiture.

about the Shirevewick of *Middlesex*; *Resp.* 'Tho' the Execution of the Office is without the City, yet the Interest of the Franchise is within the City, as being a Franchise belonging to them, and therefore within their Jurisdiction; for it is their Property, and vested in them as the Body Politick of the City; the Persons to be chose are Citizens, and all Acts necessary to be done towards it, as Appearance, &c. are done in *London*. 2^d Objection was, that it is unreasonable to impose an Oath on the Party; and more unreasonable to find six Compurgators, and to be such as the Lord Mayor and Aldermen shall approve of. *Resp.* 'This is an Ease to them from a Burthen, for every Citizen was originally compellable to serve; and this excuses them, if they swear themselves not worth 10,000 *l.* which they are not compelled to do; it is a voluntary Oath, which is not against Law. 3 *Cr.* 469. 1 *Sid.* 283. And as to the having six Compurgators, it is but in Imitation of the common Law; for tho' the Books mention twelve, yet the Course of *C. B.* is to have but six; and it is reasonable the Mayor, &c. should have the Refusal of them, that they be not infamous Persons. 3^d Objection is, that the Person chosen is obliged to appear at the next Court after his Election, under the Penalty of 400 *l.* without a reasonable Excuse, to be allowed by the Mayor and Aldermen. *Resp.* Whatever Excuse he makes, if they allow it, the City is bound by it; and if they refuse to allow a reasonable Excuse, it is not final; for it may be pleaded or given in Evidence in an Action brought for the Penalty by the City; for it was not the Meaning of the Common Council to put an Arbitrary Power in the Lord Mayor and Aldermen, but is like the Power given by the Statute of 23 *H. 8. c.* 5. to Commissioners of Sewers, to do several Things according to their Discretion; but that must be understood of a legal Discretion. 5 *Co.* 100. 4th Objection, 'That no Provision is made for the Party elected to have Notice; and he may be in the Country at a great Distance, or beyond Sea. *Resp.* Every Citizen is supposed to be an Inhabitant, and dwelling there, and present at all publick Meetings; and if he be not, it is his own Neglect, of which he shall take no Advantage. And as to the Objection, that all Freemen are not present at the Election, but only Livery Men; *Resp.* It does not appear by the Return, that the Election is made by Livery-Men, but must be intended to be by all the Citizens; but admitting it was, every Citizen is obliged to take Notice of what they do, because they represent the whole; they are virtually present, and must take Notice, as all People do of

Every Citizen
oblig'd to take
Notice of E-
lection, for are
virtually pre-
sent.

Parliament Acts. The Election of Sheriff is a notorious Act, and the Proclamations of it on the Hustings is publick; in a *Præcipe quod reddat* Summons on the Land is sufficient; so Proclamation in the County Court in case of an Outlawry, tho' Party be removed into another County. If a Man thinks he is liable to be chosen, and he is at York, he may get some body to inform him of it, and to go to the Court of Aldermen to give him Time to appear; otherwise such Citizens at Time of Election would get out of the City, on purpose to avoid being chosen; wherefore Judgment that a *Procedendo* should go.

Robins versus Robins.

Action *sur Case*, the Plaintiff declared, that the Defendant *prætextu et colore cujusdam mediæ processus in Lege arrestari causavit* the Plaintiff, and held him to special Bail without Cause; on Not guilty, and Verdict *pro Quer'*, it was moved in Arrest of Judgment, because the Writ is not shewn, on which the Arrest was, nor is it averred by whom he is prosecuted; whereas it ought to have been shewn more certainly and specially, *viz.* That he owed the Defendant but so much, and that the Defendant intending to oppress him, had caused him to be arrested for so much, *and to be held to special Bail*; but here it does not appear to the Court, that the Sum for which he was arrested required special Bail, which being the Point of the Action ought to be shewn at large. And whereas it was objected, that this Matter could not be specially shewn, because the Writ remains in the Hands of the Officer. *Resp.* The Plaintiff might have moved the Court that the Sheriff might have returned the Writ, and then all would appear. Besides, the Warrant under the Hand of the Sheriff to the Bailiff would be good Evidence.

Salk. 15.
Case for maliciously holding to special Bail without Cause, the Sum for which he was arrested should be shewn.
Ante p. 257.

Cremer versus Wickett, Pasch. 11 W. Rot. 456.

IN an Action of false Imprisonment the Defendant pleaded Misnomer in Abatement by Attorney; Plaintiff demurred, and Exception was taken to the Plea, because Misnomer cannot be pleaded by Attorney. *Br. Misnomer, 5, 66. F. N. B. 27. Theol. dig. 365. b.* for he having put in his Warrant of Attorney in the Name by which they declare against him,

Carth. 517.
Should not plead Misnomer by Attorney; and such Plea might be refused, but if received; no Cause of Demurrer.

him, he shall be estopped by his Warrant to say, that he is known by another Name: *Holt* was of Opinion *that this was good Cause to refuse the Plea*, but not Cause of Demurrer; it is no Error in the Court to admit one by Attorney that ought not; and as to the Estoppel he said, that the Entry of it on the Roll was not the Warrant of Attorney, but only a Memorandum of it, which was introduced by *Wright C. J.* in King *James II's* Time, for before they were on a Roll by themselves, and so they ought to be still; and upon Conference with the rest of the Justices Judgment was given *quod Billa cassetur. Et per Gould Justice*, if the Plaintiff would take Advantage of the Estoppel by the Warrant of Attorney, he ought to have replied to it, and relied on it.

Harper versus Davys.

On new Trial the Record must be of the Term the Plea was entred.

A *Sumpsit*, the Plea was entred in *Easter Term*, the Memorandum was of a Bill entred in *Hillary Term*; on Issue joined it was tried by *Nisi prius*, and the Verdict was set aside, and a new Trial granted, and tried this Term in *London*; and in the new *Nisi prius* Roll the *Placita* were of this Term; and that the Party appear'd and pleaded this Term, and Verdict thereon; and now Judgment was arrested, because the Issue on the Plea-Roll is of *Easter Term*, and the new Trial is but a Continuance of the same Cause; and so the Record of *Nisi prius* differs from the Plea-Roll; and so adjudged in the Case of *Dubarteen v. Chancellor*.

Sir William Lacon Child versus Harvey.

Salk. 48.
Caith. 506.
Where the
Day in Bank
is before the
Day of *Nisi prius*, it is not
amendable.

S*Ci. Fa. sur Recogn.* to pay Money at a Day certain; *solvit ad Diem* pleaded, and Issue joined, and Verdict at *Nisi prius* for Plaintiff: And *Northey* moved to set it aside, because the *Distringas* and *Furata* were returnable *a die Sanctæ Trin. in tres septimanas nisi Joh'es Holt, &c. 27 Junii prius vener'*, which 27th of *June* was the Day after *tres Trin.* but the Award on the Plea-Roll being *tres Mich.* it was moved to amend this Mistake of the Clerk, because in all Cases, in which there is a Record to amend by, and the Amendment does not alter the Point in Issue, the Court may give Leave to amend; here the Award on the Roll is right; so is the Issue: And the Judge of *Nisi prius* had Authority to try the Cause *per W. 2. c. 30.* which requires only that a Day

and Place certain be appointed in the Shire; and this is a plain Misprision of the Clerk, in Writing *Tres Trin'* for *Tres Mich.* 1 Cr. 595. 2 Cr. 353. Dy. 260. and the Case of Sir R. Barnard, Mich. 8 W. But *per Holt*, tho' the Day of Return of the *Postea* should be mistaken, yet if the Cause was tried on the right Day, it would be good; but here the Day of *Nisi prius* being an impossible Day, and the Authority of the Judge confined to it, a Trial on another Day will be without Authority, and therefore not amendable. If the *Distringas* and *Furata* had been right, the *Nisi prius* Roll might have been amended, as was in Sir R. Bernard's Case; wherefore here the Trial was set aside.

Bond versus Spark, Coleman and Hunt.

A Ssault and Battery; Issue joined on *son Assault demesne*; New Trial not to be, unless against all. two were acquitted, and *Sparks* found guilty; and it was certified by the Judge to be against Evidence; and Motion for a new Trial; but the Court said, a new Trial could not be granted except against all; whereupon the Attorney for the Defendants consented for the two Defendants which were acquitted, that they should undergo a new Trial, and quit the Costs which they might have from the Plaintiff on their Acquittal; and *Sparks* consented to pay the Plaintiff Costs; and so a new Trial was granted against all.

Doctor Brookbanck versus Allenson.

DOCTOR B. Chancellor of *Durham*, issued a Citation *ex Carth. 504.* *officio versus Allenson* for Incontinency, and that she Citation may be on Sunday. should be personally served with it; and if it could not be so, then to fix it on a *Sunday* on the Church-door; and it was so done, and she was excommunicated for not appearing; and now her Counsel moved for a Prohibition; because by 29 Car. 2. no Process shall be served on a *Sunday*; and that by that Statute this Citation is void. But the Court was of Opinion it was good, and proper to be executed on that Day; and that the Statute did not forbid the Execution of such Process as could not be but on *Sunday*; and so it is in the Case of Summons in real Actions; and if by the Ecclesiastical Laws, Process is to be served on a *Sunday*, the general Words of this Statute will not take it away.

Mitchell

Mitchell & Ux' versus Garret.

*Ne ungue acou-
ple in Matri-
mony no Plea
in personal
Actions.
Diversity.*

CASE by Baron and Feme for a Cause arising before Marriage; Defendant pleads, that Plaintiffs *nunquam legitimo matrimonio copulat' fuerunt*; *Replic'*, that they were married at such a Time and Place; Demurrer, and Judgment *pro Quer'*; because the Plea was naught; for in Personal Actions you must lay the Matter on the Fact of the Marriage to make it triable by the Country, and not upon the Right of the Marriage, as in Appeals and real Actions.

Tates versus Fettiplace. In Cancell'.

Vide 1 Vern.
321.
2 Vern. 72.
92, 417, 424,
439.
Portion de-
vised out of
Land, pay-
able at a fu-
ture Day; if
the Person to
whom payable
dies before the
Day of Pay-
ment, it is
funk; *aliter*
out of perso-
nal Estate.

A. Seised of Lands in Fee had Issue a Daughter, and by his Will he charged the Lands with 5000*l.* for her Portion, to be paid at her Age of twenty-one Years, or Day of Marriage, and dies; the Daughter dies at six Years of Age; second Husband of the Daughter's Mother takes out Administration to the Daughter and to Mother his Wife; and the Question was, if he should have the 5000*l.* or if it should be funk for the Benefit of the Heir. And my Lord Chancellor *Somers* decreed for the Heir; and held, that in all Cases where a Man charged a Sum certain to be paid, as here, out of the real Estate, there, if the Person dies, the Money shall be funk for the Benefit of the Heir: But if a Man devises a Personal Legacy, or a Sum to be paid out of a Term for Years, and the Legatee dies before the Age, &c. the Executors or Administrators of the Legatee shall have the Money, because it was *debitum in presenti*, tho' *solvendum in futuro*.

N. B. The Report of this Case in 2 *Vern.* 417. is, as to the State of it, different.

Hilliard versus Gennings.

Carth. 514.
A Devisee in
a Will is no
good Witness
to it.

THIS was an Issue directed out of Chancery, to be tried in a feigned Action, whether *Thomas Gennings* the Younger, by any last Will in Writing, devised to *William Hilliard* the Plaintiff; and upon a special Verdict it was found, That *Tho. Gennings*, Husband of the Defendant, was seised in Fee of the Lands in Question, and had Issue by the Defendant *Tho. Gennings* Junior his only Son, and two Daughters, *M.* and *El.* who are now living; that *Thomas* the

the Father made a Will 27 Decem' 1679. in these Words, *I devise to my Son Tho. Gennings, and his Heirs for ever, all that my Manor of Earnesly, which I lately purchased of H. W. but if it shall happen that my said Son shall die before he attain the Age of twenty-one Years, or without Issue of his Body lawfully begotten, then my said Land shall be divided between my said Daughters, Mary and Eliz. and their Heirs for ever*: That the Father died seised as aforesaid; that *Tho. G.* the Son entered and became seised *prout lex postulat*, and being above the Age of twenty-one Years made his last Will 7 April 1695. in the Presence of *A. B.* and *W. Hilliard* the Plaintiff, and they subscribed their Hands as Witnesses, in the Presence of the Testator, whereby he devised the said Lands to the Plaintiff *Will. Hilliard*, and his Heirs; that *Tho. Gennings* Junior was also Heir to his Father; that 18th of May 1695. he died seised without Issue of his Body. And it was urged by *Carthew* for the Plaintiff, that *Tho. Gennings* Junior had all the Fee in him, and therefore might well devise to the Plaintiff; for the Word *Or* shall be construed *And*; so that the Remainder could not vest till *Tho. Gennings* died without Issue, and under the Age of twenty-one Years of Age; and to make another Construction would be to defeat the Intent of the Devisor; for he meant, that the Issue of his Son should inherit before his own Daughter; but if *or* shall not be construed *and*, then if the Son has Issue, and dies before the Age of twenty-one, such Issue shall not inherit, which is expressly contrary to Intent of Devisor; then the Remainder limited over would be void. *Cr. El.* 525. 1 *Vent.* 62. 1 *Leo.* 74. But *per Holt*; There is no Necessity to construe *Or* as *And* in this Case; for it might be the Design of the Father to hinder him from marrying till his Age of twenty-one Years; and as for the Case in *Cr. El.* that was adjudged to be an Estate-tail; but to this Point the Court gave no Opinion; and after *Holt* denied that Case to be Law: But the second Point was, whether this was a good Will within the Statute of Frauds and Perjuries, 29 *Ca.* 2. the Devisor being one of the three Witnesses; and the Court were of Opinion, that for this Reason the Devise was void; for every Day's Experience shews that the Devisee cannot be a Witness to prove that Will; and the Intent of the Act was to prevent People from setting up forged Wills, which would be frustrated, if Devisees should be allowed as Witnesses of their own Will. *Jud' pro Def', nisi causa*; and in *Hill.* Term Rule made absolute.

D E

Term. Paschæ,

Anno 11 W. III. in C. B.

Scattergood versus Edges.

Salk. 229.
Devise to the
first Issue Male
of A. (A. ha-
ving none at
that Time) is
void.

*J. C. also now
more fully reported
in an addition
to 11. Mod. 11. 4
1701. p. 277.*

THE Case found by special Verdict was: *Ralph Edges* being seised in Fee of the Manor of — in *Norfolk*, did by Will bearing Date 36 Car. 2. devise the said Manor to — Serjeant at Law for eleven Years, upon several Trusts; and after in the Will were these Words; *Item, I give and bequeath my said Manor of — to the first Issue Male of George Jakes, and the Heirs Males of his Body; and for Default of such Heirs Males of his Body, to the second Issue Male of G. J. and the Heirs Males of his Body; and for Default, &c. to the third Issue Male, &c. and so to the Fourth; provided they should respectively take upon themselves the Surname of Edges; and if they should not take upon them the Surname of Edges, or should die without Issue Male, as above, then to the first Issue of G. Convoy, (who at the Time of Devise had Issue a Son,) with Limitation, as above, to the second, third and fourth Son of George Convoy, and same Proviso as above; and if they should not assume the Name, &c. then to P. Edges for Life, and after to the Heirs Males of his Body; Remainder to the right Heirs of Devisor. George Jakes had no Issue at Time of Devise, and died without Issue; Lease for Years expires; Issue of George Convoy, who was in Being at the Time of Devise, enters and takes upon him the Name of Edges; upon whom the Plaintiff, Heir at Law of Devisor, enters, whom Edges ousts; and upon that this Ejectment was brought. This Case was argued *seriatim* by the Bench; and *Blinco* puisne Judge argued for Plaintiff, and *Powel, Nevill* and *Treby* for Defendant.*

Blinco: It is a Rule in Construction of Wills to support Intent of Testator, as far as it can be made consonant with the Rules of Law: But here it is plain it cannot be maintain'd in all Respects; and therefore there remains only to consider, what Clauses in the Will might be made good, agreeable to Law, and what could not, and so retain the one and reject the other: And 1st, it is very clear the Devise for eleven Years is good, because to commence immediately after the Devisor's Death; and the last Clause of Devise to *Paul Edges*, it is not in Question; but the whole Question is, which of the two Devises, *viz.* that to the first Issue of *G. J.* or that to the first Issue of *George C.* should stand, for they are incompatible, and cannot both subsist. If the Devise had been to Serjeant ——— for eleven Years, with Remainder to first Issue of *Convo*y, being then in *esse*, it had been unquestionably a good Remainder. So if Devise to the first Issue of *George Jakes* be void, the Devise to Issue of *G. C.* is good; so we must consider this Case, as if *George J.* had Issue now on one Side of the Court, contesting with the first Issue of *Convo*y about this Estate, upon this Will.

It is a Rule, that in all Devises of this Nature we consider what may, or might have fallen out, and not what does fall out.

Devise of a Term to *A.* for Life, and after to *B.* for Life, and to *C.* for Life, is good, if they be all in *esse* at the Time of Devise; and if it be made to Heir of one of them, all subsequent Trusts or Limitations are void, because that would tend to a Perpetuity; the like Rule of executory Devises of Land; but if the Contingency be necessarily to take Effect in *reasonable Time*, as upon two or three Lives, it will be good; contrary, if it be to continue for many Generations.

Executory Devises are not assignable or barable.

The second Devise here to the Issue of *G. Convo*y cannot possibly be good; for I hold the first is good; and consequently, by Rule of executory Devises, and contingent Trusts of Term, the second cannot be good; *vide Pell and Brown's Case*. Indeed, if the first Devise by Intent of Lessor were to pass a present Interest, it would be void, because there was none in *esse* to take it; and then the second would be good.

It appears that at the Time of Devise *G. J.* had no Issue, but *G. Convo*y had one; and we ought to intend Devisor knew this, for two Reasons; 1st, Because it is improbable one would devise Lands to one that he did not know,
whether

whether he were in *esse* or not. *2dly*, If he were in Being, he would devise the Land to him by his Name; and not by Description of first Issue Male, which is the usual Term, when the Party is not in *esse*; and therefore I conceive he intended it as an executory Devise, and therefore good.

Ray. 115, 82.

1 Rol. Ab. 612.

1 Rol. R. 218.

Cro. Jac. 394.

The Case in *Ray*. 115, 82. Devise to such of the Daughters of *J. S.* as should marry a *Norton* within fifteen Years. So Devise to Son unborn by Name of first Issue; and Devise of the Trust of a Term to first Son of *A.* by Limitation, was adjudged good. *Vide* 1 *Rol. Ab.* Tit. *Devise* 612. which Authority was cited by *Holt* C. J. in the Duke of *Norfolk's* Case; and by my Lord *Nottingham* in his Argument of *Cotton* and *Heath's* Case; nor do I find that this Authority was ever questioned, nor is there any Difference between it and our Case. Where there is an intervening Limitation, that would make a Perpetuity, it shall be void, and the subsequent may be good; and for this *Cotton* and *Heath's* Case is a full Authority, *vide* 1 *Rol. Rep.* 218. *Blanford's* Case, *Cr. Jac.* 395. The Limitation was to a Person not in *esse*, for three Years after there was a Child born, who by Judgment of Court had Title to the Estate; and Trusts of Terms and Devises ought to receive the same Construction. Nor is the Possibility in our Case a remote one; for it must be in the Life of *George. J.* or at most within forty Weeks after, which I do not look upon as a distinct Space from his Life, but rather an *Appendix* of it; and the Possibility of the Case of *Bates* and *Amerst* is more remote; and if this be a good Devise to Issue of *G. J.* by the first Constitution thereof, it cannot be vitiated by Matter *ex post facto*.

*In this case
in Ray m. p. 2.
1 Rol. Ab. 612.
1 Rol. R. 218.
Cro. Jac. 394.
Hinn. 230.*

Powell agreed with the Rule put by *Blinckow* concerning the Construction of Wills; and that neither of these Devises could take by Way of Remainder, for Want of a particular Estate to support them.

So the first Question will be, whether the Remainder to *G. J.'s* Issue be good. *2dly*, If not, whether that to Issue of *Convey* be so; and *3dly*, if both be void, if Plaintiff has Title as Heir at Law; and he likewise agreed with *Blinckow's* Notion, that this Case ought to be considered as if the Contest were now between Issues of *Fakes* and *Convey* upon this Will; and he said it seemed plain the Devisor intended Issue of *Fakes* should be preferred; but he conceived such Intent was inconsistent with the Rules of Law; for it could not be but by Way of executory Devise, and that would not do, as this Case stood.

In Inheritances there may be two Sorts of executory Devises. 1st, When Devisor parts with the whole Fee out of him, and after qualifies the Estate of the Devisee, and limits contingent Remainders over; and this is repugnant to the Rules of Common Law, to have one Fee depend upon another. 1 *Inst.* 18. By Act of Party one Fee cannot depend upon another; tho' it may by Act in Law, as it is often seen since the Statute of 26 H. 8. c. for Forfeitures of Estates-tail, and since Fines are become so usual; and tho' *Vaughan*, in the Case of *Gardner* and *Sheldner*, contradicts this Opinion of my Lord *Coke*, and is angry because he cites no Authority for it, yet he himself shews no Authority to the contrary; and it is no Wonder *Coke* shews no Authority, for it were to prove a Thing could not be that never was done. 19 H. 8. 8. b. *Dy.* 33. held it cannot be, even in a Will. And the first of these Devises, that we find, is *Wellock* and *Hamond's* Case, cited 3 Co. *Boraston's* Case. *Cr. El.* 204. 2 *Leo.* 114. and was first countenanced in Favour of Provision for younger Children, and of Land devisable by Custom. *Vide Cr. El.* 532, 525, 360, 497. 2 *And.* 22. *More* 422, 464. *Pell* and *Brown's* Case; *Doderidge* did oppose the Opinion of the other three Judges, as to the Point of its not being barred by Recovery; and the Opinion in 1 *Rel. Rep.* 835, 836. and *Style* 274. went down with the Judges like chepp'd Hay; but since it has been so often passed over, it must not be questioned now, because the Estates of many depend upon it; but this is not like our Case.

One Fee can not depend on another by Act of the Party, but may by Act of Law

19 H. 8. 8. b. *Dyer* 33

2d Sort is when Devisor does not part with the whole out of himself, but gives future Estates to rise upon Contingencies, and leaves the Inheritance to descend in the mean Time; and this is not disagreeable to the Common Law; as in Case of Devise, that Executor shall sell Land, where the Lands descend in the mean Time; and when the Executor doth sell it, Vendee is in from the first Testator; and in Pleading must claim under him; and by the Selling, the Freehold and Inheritance is, by Act in Law, devested out of the Heir or Lord by Escheat; even out of the King, if he were Lord by Escheat, without Petition, or *Monstrans de droit.* 29 *Ed.* 3. 16.

And there were no other Cases of this Nature, till of late; and the first was *Hynd* and *Ijons*, 2 *Leo.* 11. 3 *Leo.* 64, 67. the next was the Case in *Cr. El.* 838, 819. 2 *Rel. Ab.* 793. and *Bate's* Case in *Raymond* 82. and in the Case of *Weldon* and *Elpington* in *Plowden*, they take a Difference between an Inheritance and a Term; but it was at last re-

solved in *Manning's Case*, that there is no Difference; which Point prevailed against the Opinion of a great Lawyer, and Rules of Common Law.

Now Judges ought to take great Care that they do not come to be made Perpetuities; for they cannot be barred by a Common Recovery, &c. because they have no Dependancy on the particular Estate; as is adjudged in *Pell* and *Brown's Case*; and therefore to extend them beyond a common Possibility will be dangerous; and there be two Sorts of Perpetuities, an absolute one, and a qualified one; and Estates-tail, from the Time of the Statute of *Donis* till common Recoveries were found out, were look'd upon as Perpetuities. And suppose this Devise to the first Issue of G. 7. be good, it is to him and Heirs; and if that failed, another Contingent limited over, which could not be barred: And by my Consent, these Sort of Limitations shall never be carried beyond a Life; nor do I find any Authorities to the contrary, but that of *Vaughan* before cited, for which he quotes no Authority; and as for 1 *Leo.* 438. I do doubt it is not Law.

Whether the Devise to the first Issue of G. 7. be good, two Things occur to be considered; 1st, If the Devise to the first Issue of one who has no Issue at that Time be good. 2^d, Whether a Lease for eleven Years, precedent to such a Devise, be good Reason of a Diversity between the Cases.

Devise to the first Issue of one, who at that Time had none, is void.

And I hold, if there were no precedent Lease, a Devise to the first Issue of one, who at that Time had none, would be void, and I find no Authority to the contrary; the Case most like it seems to be a Devise to *Fitz in Ventre sa mere*; for he was not in *esse* at Time of Devise; and yet that Case is not to be compared to ours, admitting it to be Law, which has been never yet settled; but there have been Varieties of Opinions in it: The first I find is 11 *H.* 6. 15. and there *Babington* thought it good, and *Paston contra*. It is in *Brook* tit. *Devise* 609. with a *Quare.* 7 *Co.* 9. without any decisive Opinion. 1 *Rol. Ab.* 609, 610. with a *Dubit.* *Dy.* 303, 304. Devise to Infant *in Ventre sa mere*, if it be a Son, void; but I hold that not to be Law, because it is executory and contingent; but *a fortiori* it would be void by Way of present Interest. It is again mentioned in *Dyer* 342. but no Opinion. *Mo.* 127. and no Opinion; 177. adjudged good; but 664. held void. *Cr. El.* 435. if there be a new Publication of a Will, after Son born, good; *secus* not. 2 *Bulst.* 272. not good. 1 *Rol. Rep.* 110. void. *Lit. Rep.* 255. void: And thus it remained till King *Ch.* 2.'s Time. In *Snow* and *Cutler's Case* in *Sid.* 153. and *Keb.* Court was divided; but

Devise to Infant *in Ventre sa mere*, whether good or not.

but in 2 *Mod.* 9. Chancellor *Finch* held it good; and my Lord *Bridgeman* held the same, with great Respect to former Opinions; and I hold it to be good; because the Rule is, that, when by the Words of Devisor it apparently is designed for a future Interest or Devise, it is good; and when Devise is to *Fitz in Ventre sa mere*, without more saying, it is plain he means a future Devise, because by the very Words he takes Notice of his not being in *esse*; and that is tantamount, as if he had devised to another for a Time, or let it descend to the Heir for a Time. But in a Devise to first Son of *J. S.* who has no Son at that Time, none can tell by Words of the Devisor whether he meant it should take presently or futurely; and therefore it is no more than a present Devise to a Person not in *esse*. Vide ante p. 39. *Simile.* 52.

Obj. This is not like a Devise at Common Law; and the Estate may descend in the mean Time. *Answe.* *Non liquet* by Words of the Devise, that Devisor intended it should descend or not; and if it should be good to first Son of *J. S.* the next Thing would be to make a Devise to right Heirs of *J. S.* good; nor is the one more remote than the other; for by the Death of *J. S.* he shall have an Heir, if ever, and it may be he may not have a Son till after his Death: *But* in all these Cases it would be good by Way of a future Devise; as that in Case *J. S.* shall have a Son, that he shall have it; that would I say be good, if he has a Son in his Life-time, but not to a posthumous Son. Ante p. 39. 52, 53. *acc.*

But what seems most difficult in this Case is, whether, there being a Term of eleven Years to expire, it did not come to Issue of *G. J.* by Way of Remainder, after the End of eleven Years; and whether in that Case it shall not be intended an executory Devise; for a Remainder to *Fitz in Ventre sa mere*, upon a Term for Years, was always held to be an executory Devise, and good, even by those who did oppose a Devise to *Fitz in Ventre sa mere*'s being good.

I for a long Time have been of Opinion, that this being after a Term for eleven Years would be a good executory Devise to Issue of *G. J.* but upon great Consideration, I hold it naught now; nor do I go upon the Words of the Statute of Wills, in which there are no such Words as *Person* or *Persons*, as in the Statute of Uses. And as my Lord *Finch*, lead by the vulgar Error, seemed to ground his Opinion, if rightly reported in *Snow* and *Cutler's* Case; it is true, a Use limited to *Fitz in Ventre sa mere* is void, because no *Person* according to Statute of Uses; but Statute of Wills makes no Mention of Person, and that makes the Difference.

The

The Authorities against me are *Nurse* and *Yarworth's* Case, which was a Devise of a Term for Years, Remainder to the Heirs of the Body of Devisee; and this good by Chancellor *Nottingham*, because of the Term for Years. 2 *Mod. Rep.* 292. Devise for twenty-one Years, Remainder to right Heirs of *J. S.* good, for the same Reason. 18 *El.* Justice *Rhodes's* written Reports; Devise for Years with Remainder to right Heirs of *J. S.* good, if *J. S.* died during the Years; and *Cotton* and *Heath's* Case was held good, in Respect of a precedent Term.

Devise to the first Issue of *A.* (being after a precedent Term) not good by Way of executory Devise.

But the Words of the Will in our Case are considerable. *I give and bequeath the Manor of ——— to Serjeant ———, in Trust for eleven Years; and then follow these Words; Item, I give and bequeath my said Manor to the first Issue of G. J.* by which Words it seems plainly he meant to pass the Freehold and Inheritance immediately to the Issue of *G. J.* and not that it should not go to him till after eleven Years, and so descend to Heir at Law in the mean Time; for the Words are *in presenti*, and look like an immediate Devise of the Freehold.

Ante p. 53.

And to the Opinion of *Finch* in Chancery I oppose the Opinion of the Court of *K. B.* lately in the Case of *Goodright* and *Cornish*; and *Cotton* and *Heath's* Case is an Abridgment; and judged otherwise in *Sir H. Gore's* Case. Since *Hill.* 33 & 34 *Car.* 2. it was an immediate Remainder by Devise to Heir Male of Body, and held void; and if Lease were devised to *A.* for Life, Remainder to first Issue Male of *J. S.* who then has none, the Remainder would be void; for to make *Manning's* Case Law, they were forced to make the second Devise first, and thereupon it was a present Devise to a Person in *esse*, and so good; which would be otherwise, if Devisee of Remainder were not in *esse*; and the second, *C. J. Hale* and *Bridgman* held, that a Devise of a Term's Trust by present Words to one not in *esse* would not be good; and the Case of *Cotton* and *Heath* was in Chancery; and what a Chancellor decrees in Case of Trust of a Term is no Rule for us to walk by; and the Case of *Snow* and *Cutler* was a Devise to Wife for Life, Remainder to Heirs of *J. S.* and all the Court held, that it would be void, as to Remainder, if there had been no Estate for Life; but whether that would alter it, they were divided.

Our Case cannot be thought a future Devise, because the Words are *de presenti*, *I give and bequeath*; and tho' it appears by the Will the Possession was future, yet the Freehold

hold is present. *Vide 6 Co. Wild's Case*; Devise to a Man and his Children, if there be no Children in Being, they cannot take as soon as they are born; because the Words are present, and they not in *esse*. And they cannot take by Way of Remainder, because the Words are present. *Skelton and Wright's Case*; Devise to one & *liberis procreat' & procreand'*, was adjudged a future Devise; because that appear'd to be the Intention of the Feoffor, by the Word *procreandis*.

If the Devise in our Case were to Serjeant ——— for eleven Years, the Remainder to first Issue of G. J. I would perhaps construe it as an executory Devise; and make it good, if G. J. should have Issue during the eleven Years, otherwise not; and that is according to *Bates and Amerst's Case*; for as a Marriage of one of the Daughters with a *Norton* would not be good after the fifteen Years; so here, an Issue born after the eleven Years should not take; and if the Devise had been to the first Issue to be begotten of G. J. then I would give it to any Issue born during Life of G. J. but would not extend it to a Posthumous Son. Ray. 115.

But it is objected from the Bar by Serjeant *Lutwich*, that tho' this Devise were void as to Issue of G. J. yet it could not be good to the Son of G. C. because it depended on a precedent Condition, *viz.* If Issue of G. J. should refuse to assume the Name of *Edges*, or die without Issue; which are impossible, G. J. dying without Issue; *vide Plowd. 272. 2 Inst. 218.* tho' the Condition there became impossible by Act of the Party himself; and this Notion was agreed to by the whole Court.

But here it was adjudged not to be a precedent Condition, but Part of a Limitation of a Devise of a particular Estate, which is void; but if it were collateral by it self, it would be a precedent Condition. *Vide 9 H. 6. pl. 34, 39. f. 16.* where Devise to a Monk, with Remainder over, he in Remainder shall take immediately, because Devise to Monk is void; but if it were, that after Death of Monk, it should remain, it should not take till after Death of Monk; *vide Lord Paget's Case.* Devise to one for Life, who is incapable of taking, Remainder over, he in Remainder takes immediately.

7 *Ed. 3. 19.* A. seised in Fee makes a Gift in Tail, and if Donee died without Issue, it should revert to Donor for Life, Remainder over in Fee; it was adjudged, that the Reversion to himself for Life was void, and by Consequence it should remain over immediately; and in our Case; the Devise being void, whatever depends on it will be void; and upon the whole Matter, this is but a De-

vise for eleven Years, Remainder to Issue of G. Conroy then in Being.

Nevill argued briefly, and agreeing with *Powell* in the Main touched upon the two great Rules in Construction of Wills; 1st, to maintain Intent of Feoffor, where it plainly appeared in the Will, and consisted with Rules of Law. 2^{dly}, That if it be a present Devise, there be one in Being capable of taking at Death of Devisor; and that this was plainly a present Devise to Issue of G. J. and therefore void, there being none in *esse*; then the second Clause to Issue of G. C. is good, according to 11 H. 6. 7. Devise to a Monk, Remainder over; he in Remainder shall take presently, tho' there is a Possibility the Monk should be deraign'd. 3 Cr. *Fuller v. Fuller*; and *Taylor and Bidolph*, 2 Mod. Devise to Sister and Heirs, till Son should come to twenty-one Years, and then to Son and his Heirs; resolved that the Fee was immediately in the Son. And as to *Proviso*, it is sometimes a Condition, sometimes a Limitation, and sometimes a Covenant. 1 *Inst.* 203. 1 Cr. 209. It is here a Limitation; and concluded *pro Def.*

Treby C. J. These and such like Estates are against the antient Common Law; and therefore it may be said of them as my Lord *Coke* did of the Statute of *Donis*, that since they crept into the Law, they have occasioned great Confusion and Disorder: And he said, here the Issue of G. J. could not take presently, because not in Being; nor futurely by Way of executory Devise, because the Devise is *in verbis de presenti*; and therefore he could not take at all, and then the second Devise is good: And he laid no Stress upon the Lease of eleven Years; for he said a Son might be born within them, and he might not; but he said, if Devise had been, that two Years after the eleven Years Issue of G. J. should take, it would be a plain executory Devise; for the Words then would plainly shew it designed futurely. But where by the Words of the Will it appears a present Devise was intended, it ought not to be rather construed an executory one, than the Will should be frustrated; and for that Devise to right Heirs of J. S. who is in full Life, shall not be made good. And antient Books generally ran, that Devise to *Fitz in Ventre sa mere* is void; but I think we must allow such a Devise to be good now; for otherwise many Wills would be destroyed, which would be inconvenient; and sure there is no Difference between saying, *I give my Land to the Child my Wife goes with, and to the Child my Wife shall have.*

As to Executory Devises, they were utterly unknown to the Common Law, have obtained with much ado; and now that they have prevailed, ought to be look'd upon with much Jealousy, lest they run to a Perpetuity: And a Perpetuity is such a Condition of a Fee, that Feoffee shall not be able to give absolutely to another. And it was a great Policy of the Common Law, that Alienations should be encouraged; for it is the greatest Preserver and Promoter of Industry, Trade, Arms, and Study; and this was visible from the making of the Statute of *Donis*, till common Recoveries were found out; and these Executory Devises had not been long countenanced when the Judges repented them; and if it were to be done again, it would never have prevailed; and therefore there are Bounds set to them, *viz.* a Life or Lives in Being; and further they shall never go by my Consent, at Law; let Chancery do as they please. *Pop. 6.* Court would not prescribe them any set Number of Years, but that they should not exceed a Life or Lives in Being. But I will not say but an executory Devise may well be to the right Heirs of *J. S. 2 Cr. 459. Pal. 335. 1 Jo. 15.* Limitation of Lease to *A.* for Life, and if she died without Issue living at Time of her Death, then to *B.* adjudged void. And *Croke* says *Manning's Case* would not hold now. *1 Rol. Ab. 612, 613. 1 Sid. 37.* If *Manning's Case* were to be judged now, it would be hard to maintain it. *Ray. 493.* Setting Bounds to them now is like a Correction of the Judges that gave them Countenance first. And so says *Hales, 3 Keb. 178, 123.* Contingency ought not to exceed one or two Lives, for that is a reasonable Extent; but here it is to a Son which perhaps would not be born in forty or one Hundred Years. *Carter 87, 98.* Devise to Infant *in ventre sa mere* is good, but void to Son; and that, as far as that Book is an Authority, is in Point. *Noy 43.* Devise to *A.* for Life, Remainder to first Son; Devisee dies leaving Wife *enseint*, the Inheritance descends, and vests in Heir of Devisor; and Devesting of Estates is not favoured in Law: And in Executory Devises the Contingency must happen during particular Estate, or never. *Coston and Heath's Case* was a Trust in Chancery, where they carry those Things farther than at Law.

In Executory Devises, the Contingency must happen during the particular Estate, or never.

He held the *Proviso* to be a Limitation and no Condition, and therefore first Devise being void, second shall stand, as if Grant be to two, one whereof is capable, and the other not, he that is capable shall take all; so where they are to take at divers Times; as Grant to Father, and Son not in Being, Father shall take all. *1 Co. 100, 101.* Estate for Life devised to

to

to one incapable, Remainder over is good. 1 *Leo.* 195. *rel* 125. Lease for Life to a Person not in Being, and Lease to another to commence from Determination of first Term, commences presently. *Mo.* 486, 520. *Holcroft's* Case is in Point. *Jud. pro Def.*

1 Salk. 325.

2 Vern. 480.

Carth. 511.

Pre. Chan.

237.

Bond given before Marriage to the Wife, conditioned to leave her worth so much, if she survived.

Per two Judges, that the Bond is only suspended by the Marriage.

Per Holt, that it is thereby extinguished.

Cage and Acton.

DEBT against Defendant as Administratrix to Husband for Arrears of Rent upon a Lease made to him in his Life-time. Defendant pleaded, that before the Intermarriage between him and her, there was a Bond entred into by him to her, to pay so much Money to her, her Executors, Administrators or Assigns, upon Condition that in case she should survive him, he would leave her worth so much Money; that he has not performed the Condition; that she has not Assets above 200*l.* which is a less Sum than that which he had bound himself to pay her; and that she retain'd that in Part; upon which Plaintiff demurred generally.

The Points in this Case were two; the 1st, Whether Debt upon a Bond were of as high a Nature as Rent; so that an Executor might give it Preference of Payment.

2^{dly}, Whether the subsequent Marriage were a Release of the Bond; and this Case was argued at the Bar twice, first by *Brotherick* for Plaintiff, and *Carthew* for Defendant; and after by Serjeant *Lev.* for the Defendant, and ——— for Plaintiff; but Court, *viz.* *Holt*, *Rokeby*, *Turton*, and *Gold*, agreed clearly, that Rent, whether upon a Parol or Lease by Deed, was in equal Degree to Bond, and Executor might prefer whom he pleased; but the second Point being more doubtful, and *Brotherick* for Plaintiff said, and laid it down for a Rule, that if a personal Action or Duty be once extinct, it ever is so; and therefore they cannot be released upon a Condition subsequent. 1 *Ro. Ab.* 412, 413. And tho' here this Duty was not *solvendum* but *in futuro*, and on a Contingency, *viz.* if the Wife survived, yet the Lien was present; and if this were a Bond by a Stranger to the Wife, the Husband after Marriage might have released; and it were hard then that he should have Power to release to another, and not to himself; and the Discharge depends upon the Duty, and not on the Remedy for it; and the Husband has a more absolute Power on a Duty to his Wife than on an Action for it; for if Bond be made to Wife before Mar-

Marriage, Husband cannot sue for it without Wife, yet he may release it without her: And that every Obligation creates a present Duty, appears by the Forms of Pleading; and Obligation and Condition are not one Deed, but the one is in a Manner subsequent to the other; and therefore when you crave Oyer of the Obligation the Condition is not set forth, but you must crave oyer thereof separately. 3 Cro. 580. 5 Co. 70. are in Point; for if I covenant to infeof you before *Mich.* a Release of all Actions before *Mich.* discharges not the Covenant; but if I bind myself in a Bond for Performance thereof, there is an immediate Duty releasable immediately; but if Marriage did not release it in our Case, the Consequence would be absurd, that there should be an immediate Duty unreleasable during the Coverture. 2 Leo. 20. If Writ be sued out before the Day of Payment, and that Day incurs before Judgment, the Writ is good, because there was a Duty at the Time of Purchase of Writ; and he said *Tel.* 156. *Hob.* 216. were rather for him than against him, and that *Godbolt* 271. *Hutt.* 17. *Noy* 26. came nearest to the Case, and quoted 2 *Rol. Rep.* 134. in Point for him.

Carthew agreed, that regularly there is in every Obligation a present Duty; but that, he said, was to be understood when the *Solvendum* was to be on a certain fix'd Time, and not upon a Contingency; for then he would have it a meer Possibility, which in its Nature is not releasable: And he said, that whether the Condition of an Obligation be precedent or subsequent, both made but one Deed; as if *A.* covenant with *B.* to pay *B.* 10 *l.* if *B.* does such a Thing; *B.* brings Covenant, and pleads only what is for his Purpose, and the rest must come of the other Side; and one can crave Oyer of nothing but what is Part of the same Deed; for if there be a Defeasance in another Deed, you must produce it in Court, which proves the Condition and Obligation to be but one Deed; and where there is a present Duty, Marriage is a Release of it; otherwise when the Duty is to arise upon a Contingency, as here; a Promise, if it be put in Writing, is a Covenant; indeed a Bond does found in Duty, and therefore this Writing deserves more the Name of a Covenant than that of Bond: And he seem'd to rely much on 2 *Sid.* 58, 59. *Lupart v. Hoblin*; *vid. lib.* and after in *Mich.* 11 W. 3. *Rokeby* being dead, the Court argued *Seriatim*, and *Gold* and *Turton* for Defendant, that Marriage did not release the Bond. *Holt, totis viribus contra*, and that it was clearly a Release.

Marriage is a Release of all Bonds, which may become due during the Coverture.

Gold: Marriage clearly is a Release of all Bonds and Specialties, whether contingent or not, which by any Possibility may become payable during the Marriage; 1st, because Husband Wife are but one Person in Law, and so there can be no Payment between them. 2^{dly}, because the Suit is once suspended; and then it shall ever be so. 11 H. 7. 15. 10 H. 7. 1 *Inst.* 264. *Dy.* 141.

But the great Objection is, how this Bond shall subsist, there being now no body to whom it is due, and every Obligation is *Debitum in presenti*; and a Husband's owing a Thing to his Wife, is owing a Thing to himself, which is absurd.

If Executrix marries the Debtor, it is no Release, because that would be a *Devastavit*.

Answer. The Law very often makes a Fiction for Preservation of a Right; and a Suspension of a Personal Duty is not always an Extinguishment. *Litt.* §. 646, 647. And this is a necessary and prudent Provision in case of Survivorship; and it were hard Marriage should destroy that whereof it was the Cause; and the Rule is, *modus et conventio vincunt legem*, and Law, by its own Operation, will do no Wrong; and sure it would be a great Wrong to defeat the Wife of her Provision. 1 *Inst.* 264. 8 *Co.* 136. If Feme Executrix take Debtor to Husband, it is no Release of Debt, because it would be a *Devastavit*; and here the Law will interpose and take away the Inconsistency of Debtor and Debtee between Husband and Wife, by taking it into its own Custody: And he quoted *Dorcester and Web's Case*, 1 *Cr.* & 27 H. 8. f. 7 b. Man Obligor marries a Woman Obligee, who are after divorced, the Debt revives, and the Man shall be sued by the Woman again; and tho' here there be a *Debitum in presenti*, yet it is a qualified *Debitum*, and is no more than a Provision in case of Chattel, which the Law would make in case of Inheritance; *v.* 2 *Cr.* 571. *Hob.* 216. *Smith v. Stafford*, tho' it was urged to be a present Promise and Lien, releasable by the Wife; yet Judgment was, that such Promise was not released by the Marriage, against the Opinion of *Hob.* so here the Justice of the Law will preserve this Debt for an honest Intent. *Noy* 26. it is said it would be otherwise in a Bond; *quod fuit concessum*, but that is not said in any of the other Books that report it; and I see no Difference. *Hut.* 17, 18. Law will not work a Release contrary to the Intent of the Parties; and in *Litt. Reports* it is said, that Marriage is only a Suspension.

Turton: This Bond was not enter'd into for any present Debt or Duty, and if it had, it had been extinguish'd by the Marriage; for as Bonds given by others to the Wife are by Marriage given to, and releasable by the Husband; so

Bonds which she has from the Husband are vested in him, and so released by Act in Law. 1 *Inst.* 264. *Dy.* 6, 7, 140. 1 *Ro. Ab.* 184. 8 *Co.* 186. *Mo.* 236. *Cr. Ca.* 333 &c. And it is a Rule in Law, that Releases in Law are more mildly taken against Releaser, than Releases in Deed. 1 *Inst.* 264, 265. And it is unnatural Marriage should be a Release of that which was made by Reason of the Marriage; if Debtee make Debtor Executor, it is a Release of the Duty; but if Feme Executrix take Debtor to Husband, that is only a Suspension of the Action, and Duty remains. *Plow.* 184. *Hutt.* 99. 1 *Inst.* 264. 1 *Ro. Ab.* 194. *Hob.* 10. *Mo.* 855. Father and Son bound to *A.* jointly and severally, *A.* makes the Son's Wife Executrix, and held that was only a Suspension; and he compared a Bond to a Covenant or Promise; for no Action can be brought on any of them till broke, and Promise not released by Marriage, *ideo nec* Bond; and he quoted *Dy.* 51. *Litt. Rep.* *Clayton's Case.* *Obj.* 'That tho' Statute be of a higher Nature, it is no *Devastavit* to pay the Bond before it, because it is not due till broke. *Vide Mo.* 752. 5 *Co.* 28.

Holt, C. J. contra; there are two Questions in this Case; 1st, Whether Rent be of equal Degree with a Bond, or of higher Nature than a Bond; and if Payment of Debt upon a Bond may be pleaded in Bar of Debt for Rent; and a Case out of 2 *Vent.* was quoted at the Bar to prove Rent of higher Nature than a Bond. But I hold them to be of equal Degree; for if it be a Lease by Parol, it is in the Realty, and that is in equal Degree with a Bond, and Payment of one by Executor is a good Plea in Bar of the other; and *Newport* and *Godfrey's Case* does not contradict this; it was Debt for Rent upon a Parol Lease, Defendant pleaded such a Debt upon Obligation, *ultra quod* he had not Assets; for being *in equali gradu*, he could not plead the one against the other till Judgment, or Payment of the Money; but otherwise if one of them be of higher Nature than the other; and there is no Diversity between Debt in the Realty by Specialty, and in Realty without Specialty, as to Equality of Degrees; so that if there were no more in this Case, the Plea would be a good Plea. But the other Point is a great and considerable one, whether the Bond be not extinguish'd by Marriage, tho' given in Consideration of Marriage.

And I hold the Bond to be extinguish'd by the Marriage, and that the Bond was a present immediate Duty from the Sealing and Delivery of it; and tho' it is qualified, that is, no Action can be brought upon it, till after Death of Husband, *Litt.*

Rent due
either by Lease
or Parol is
of equal De-
gree with a
Bond.

1 *Sid.* 210.
Ante p. 7.

Vide the Case
2 *Vent.* 184.
3 *Lev.* 267.

Vide 1 *Lev.*
281. *Esquere*
de hoc. v. 3.
Lev. 114,
115. *acc.*

Bond is im-
mediate Duty
by the sealing.

Marriage is a Release of all Bonds, which may become due during the Coverture.

Gold: Marriage clearly is a Release of all Bonds and Specialties, whether contingent or not, which by any Possibility may become payable during the Marriage; 1st, because Husband Wife are but one Person in Law, and so there can be no Payment between them. 2^{dly}, because the Suit is once suspended; and then it shall ever be so. 11 H. 7. 15. 10 H. 7. 1 Inst. 264. Dy. 141.

But the great Objection is, how this Bond shall subsist, there being now nobody to whom it is due, and every Obligation is *Debitum in presenti*; and a Husband's owing a Thing to his Wife, is owing a Thing to himself, which is absurd.

If Executrix marries the Debtor, it is no Release, because that would be a *Devastavit*.

Answer. The Law very often makes a Fiction for Preservation of a Right; and a Suspension of a Personal Duty is not always an Extinguishment. Litt. §. 646, 647. And this is a necessary and prudent Provision in case of Survivorship; and it were hard Marriage should destroy that whereof it was the Cause; and the Rule is, *modus et conventio vincunt legem*, and Law, by its own Operation, will do no Wrong; and sure it would be a great Wrong to defeat the Wife of her Provision. 1 Inst. 264. 8 Co. 136. If Feme Executrix take Debtor to Husband, it is no Release of Debt, because it would be a *Devastavit*; and here the Law will interpose and take away the Inconsistency of Debtor and Debtee between Husband and Wife, by taking it into its own Custody: And he quoted *Dorcester and Web's Case*, 1 Cr. & 27 H. 8. f. 7 b. Man Obligor marries a Woman Obligee, who are after divorced, the Debt revives, and the Man shall be sued by the Woman again; and tho' here there be a *Debitum in presenti*, yet it is a qualified *Debitum*, and is no more than a Provision in case of Chattel, which the Law would make in case of Inheritance; v. 2 Cr. 571. Hob. 216. *Smith v. Stafford*, tho' it was urged to be a present Promise and Lien, releasable by the Wife; yet Judgment was, that such Promise was not released by the Marriage, against the Opinion of Hob. so here the Justice of the Law will preserve this Debt for an honest Intent. Noy 26. it is said it would be otherwise in a Bond; *quod fuit concessum*, but that is not said in any of the other Books that report it; and I see no Difference. Hut. 17, 18. Law will not work a Release contrary to the Intent of the Parties; and in *Litt. Reports* it is said, that Marriage is only a Suspension.

Turton: This Bond was not enter'd into for any present Debt or Duty, and if it had, it had been extinguish'd by the Marriage; for as Bonds given by others to the Wife are by Marriage given to, and releasable by the Husband; so

Bonds which he has from the Husband are vested in him, and so released by Act in Law. 1 *Inst.* 264. *Dy.* 6, 7, 140. 1 *Ro. Ab.* 184. 8 *Co.* 186. *Mo.* 236. *Cr. Ca.* 333 &c. And it is a Rule in Law, that Releases in Law are more mildly taken against Releaser, than Releases in Deed. 1 *Inst.* 264, 265. And it is unnatural Marriage should be a Release of that which was made by Reason of the Marriage; if Debtee make Debtor Executor, it is a Release of the Duty; but if Feme Executrix take Debtor to Husband, that is only a Suspension of the Action, and Duty remains. *Plow.* 184. *Hutt.* 99. 1 *Inst.* 264. 1 *Ro. Ab.* 194. *Hob.* 10. *Mo.* 855. Father and Son bound to *A.* jointly and severally, *A.* makes the Son's Wife Executrix, and held that was only a Suspension; and he compared a Bond to a Covenant or Promise; for no Action can be brought on any of them till broke, and Promise not released by Marriage, *ideo nec* Bond; and he quoted *Dy.* 51. *Litt. Rep.* *Clayton's Case.* *Obj.* 'That tho' Statute be of a higher Nature, it is no *Devastavit* to pay the Bond before it, because it is not due till broke. *Vide Mo.* 752. 5 *Co.* 28.

Holt, C. J. contra; there are two Questions in this Case; 1st, Whether Rent be of equal Degree with a Bond, or of higher Nature than a Bond; and if Payment of Debt upon a Bond may be pleaded in Bar of Debt for Rent; and a Case out of 2 *Vent.* was quoted at the Bar to prove Rent of higher Nature than a Bond. But I hold them to be of equal Degree; for if it be a Lease by Parol, it is in the Realty, and that is in equal Degree with a Bond, and Payment of one by Executor is a good Plea in Bar of the other; and *Newport* and *Godfrey's Case* does not contradict this; it was Debt for Rent upon a Parol Lease, Defendant pleaded such a Debt upon Obligation, *ultra quod* he had not Assets; for being *in aquali gradu*, he could not plead the one against the other till Judgment, or Payment of the Money; but otherwise if one of them be of higher Nature than the other; and there is no Diversity between Debt in the Realty by Specialty, and in Realty without Specialty, as to Equality of Degrees; so that if there were no more in this Case, the Plea would be a good Plea. But the other Point is a great and considerable one, whether the Bond be not extinguish'd by Marriage, tho' given in Consideration of Marriage.

And I hold the Bond to be extinguish'd by the Marriage, and that the Bond was a present immediate Duty from the Sealing and Delivery of it; and tho' it is qualified, that is, no Action can be brought upon it, till after Death of Husband,

Litt.

Rent due
either by Lease
or Parol is
of equal De-
gree with a
Bond.

1 *Sid.* 210.
Ante p. 7.

Vide the Case
2 *Vent.* 184.
3 *Lev.* 267.

Vide 1 *Lev.*
281. *Et quare*
de hoc. v. 3.
Lev. 114.
115. *acc.*

Bond is im-
mediate Duty
by the sealing.

Release of all
Demands will
discharge a
Debt on a
Condition sub-
sequent, but
not on Con-
dition prece-
dent.

Vide Hob. 217.

Litt. § 512. Release of all Actions, or all Debts will release it; and *Co.* in his Comment says a Release of all Actions will discharge it, tho' no Action can be brought upon it at that Time, because it was a Thing in Action, and without all Dispute a present Debt; and tho' it be payable upon Condition, yet it is a present Duty; and it being a subsequent Condition, it must have Relation to some Antecedent, which is the present Duty. 5 *Co.* 70. Diversity between Condition subsequent and Condition precedent; for Release of all Demands will not release a Debt upon a Condition precedent, but will, if upon a Condition subsequent; and to say that it is not a Precedent Debt, is directly against the Words of the Agreement; for he is to pay so much presently; and then comes the Condition, and does not suspend the Debt, but only adds a Condition with it: And when you come to declare upon this Bond, you do it plainly, without any Mention of the Condition; but if the Condition were precedent, you must set it out in Pleading, because you must shew it performed, without which you have not a Title; and tho' they demand Oyer of the Condition, and have it entred of Record, by which it is Part of the Record, yet that does not alter the Plaintiff's Declaration; for if the Defendant does not shew the Condition performed, or not broke, or plead a sufficient Plea, the Plaintiff shall have Judgment without taking any Notice of the Condition: So upon Oyer of it, if it does not appear to the Court, whether the Condition be broke or not, Plaintiff shall have Judgment; but if it does appear to Court, that the Condition is broke, or not broke, they shall give Judgment as the Condition shall direct; that is, if it be for the doing of a Thing which is not done, and that appears to the Court, Plaintiff shall have Judgment; or if it be for not doing a Thing which is not done, Defendant shall have Judgment. So it is plain here is a present Duty. *Vide* 11 *H.* 4. 43. If Obligor pay a Debt in a Bond without taking Advantage of the Condition, it is a good Payment: So if it be a Debt in the Present, he may pay it before the Day of Payment in the Condition; and Marriage is an actual Payment of the Money, for by the Marriage the Bond is given to the Husband, and then he himself is to pay it, and is the Person to whom it is to be paid, and none can pay or do other Act to himself; and if a Stranger had made a Bond to the Feme, that the Husband would leave her worth so much Money, the Husband might release it. *Co.* 264. *Plow.* 185, 186, and *Arundel's Case*; and the Books make no Distinction, *et ubi lex non distin-*

distinguit nec nos distinguere debemus: And I see no Grounds of Distinction, besides my not finding it in any Books; and suppose there had been a Defeasance of this Bond, and after an Intermarriage, sure that would discharge the Bond; and tho' a Condition be on Record, that will make no Difference, for Defendant must plead Performance of it.

And the Case where Executor of Obligee marries Obligor is different, for there are divers Rights; but where Obligee marries Obligor, there he is to receive Money to his own Use. A Man Possessed of a Term in Right of his Wife purchases the Inheritance, it is not an Extinguishment, because of divers Rights; and the Diversity of Right is a good Ground for Diversity in Law. 1 *Inst.* 264. 8 *Co.* 136. Another Reason, that such Release would work a Wrong in Prejudice to a third Person. Tenant for Life grants a Rent, and then surrenders, yet Rent shall continue during his Life; a Man having Rent in Fee confesses a Statute, and then releases the Rent, yet it shall have Existence as to the Conusee; and upon the same Reason is the Case of Marriage of Executor of Obligee to Obligor; and if Obligor pay Money to Feme Executrix of Obligee, and after marries her, the Law does not make a Gift of it to the Husband; but he shall have it liable to all the Debts and Legacies of the Testator.

If Obligor marries Obligee, the Debt is gone, but not if Executor of Obligee marries Obligor, for are different Rights.

Now a Bond is not supported by any Thing but itself; and here it is not the Marriage that is the Consideration of it, for it needs none, being sufficient of itself; but in Case of a Promise the Marriage is the Consideration, and the Consideration is what supports the Promise; and I grant the Law will work no Wrong to a third Person; but here the Marriage is the Act of her that is prejudiced by it, and therefore it cannot be thought a Wrong to her; and the Case of Divorce put, there it was no Marriage at all *ab initio*; and if Husband and Wife made a Feoffment of Lands of Wife, and were after divorced, it was a Discontinuance; for between themselves Relation made a Nullity, but never as to a third Person. *Hob.* 10. A Personal Action once suspended and ever gone. And tho' Condition be contingent, yet the Obligation is absolute, and the Marriage is a Release of the Obligation, and not of Condition, and a Release of a Condition is not a Release of the Obligation.

Bond is its own Consideration.

Now as to the Authorities quoted by my Brothers, a Man promises to leave his Wife worth 1000 *l.* in case she survived him, a subsequent Marriage does not discharge that Promise; and the Law is so, tho' against the Opinion of

Hob. but in the Case of a Promise, there is nothing due to Wife till after Death of Husband, and may be there never will be any Thing due to her.

Release of all Demands does not discharge a Covenant till broke.

What may accrue to the Wife during Marriage, Husband may release.

And Pleading doth not make Law, but on the contrary Pleading must be conformable to Law, and is good Evidence of the Law; and in Case of a Bond, a Duty arises immediately, and is only defeasible upon a Condition subsequent; but upon the Promise it does not arise till after Death of Husband; and I do agree, there is no Difference in this Respect between a Promise and a Specialty, if they be made in the same Manner; for if there be a Covenant to leave Wife worth so much Money if she survive him, that shall not be discharged by Marriage; and a Release of all Demands is not a Release of a Covenant, till it be broke; because till then it does not lie in Demand. If Promise had been by a Stranger to Wife, that Husband, in Case she survived him, would leave her so much; or if a Stranger had covenanted so, after Marriage the Husband could not release such Promise or Covenant; for the Rule is, any Thing that may accrue to Wife during Marriage the Husband may release; and such Release will be good, tho' the Thing does not fall during the Marriage. *Vide 1 Cr. Clerk and Thomson's Case.* As if Devise be of a Lease to Feme, after Death of *J. S.* tho' Husband has nothing in the Lease till after Death of *J. S.* yet he may release it; because it may fall in Possession during the Marriage. The Case in *Yelv.* 156. is not very good Sense, and is much better in *Cr. Jac.* 222. and the Reason of a Resolution is more to be considered than the Resolution it self: And tho' Intent of Parties were, that the Marriage should not release this Obligation, yet that shall never alter the Rule of Law; nor is it fit the Law should be strained or trodden down to support Intent of *Lay gens*, when they take a wrong Way of Agreement inconsistent with it.

Vide Cases in Chanc. 1 Part 118.

And he said, that even Chancery would not give Relief in this Case, tho' it may be thought much more proper for Equity than Law; and he quoted a Case in Chancery, 15 *Car.* 2. between Lady *Darcy* and *Chute & al.* Now 1 *Chancery Cases* 21. a Feme had 700 *l. per Annum*, and by Writing, with an intended Husband it was agreed between them, that she should take the Profits of it till her Death; and after Marriage the Husband took all the Profit, contrary to the Agreement; and upon this a Bill was brought in Chancery, but they would not relieve contrary to the Rule of Law.

Law. This Case went afterwards into Chancery, where Relief was given, the Bond being considered as a Marriage Agreement. 2 Vern. 480.
Prec. Chan.
237.

Carrill versus Cockran.

THE Question upon Motion was, whether they would hold Defendant to special Bail, in a special *Assumpsit* for Money won at Play; and *Turton* and *Gould* seemed to incline they should not give him better Security than he was willing to take at first. But *Holt* said, they never ought to enter into the Merits of a Cause upon a Question about Bail; for to order common Bail upon Merits would slur a Man's Cause of Action; and no Man ought to have his Cause tried with Disparagement upon it; and tho' this may be for Money won at Play, yet it was a lawful Contract which the Act of Parliament allowed of; and no Man ought to be wiser than the Law; and this was giving Money against Money, for which *Indebitatus Assumpsit* would not lie, but an Action upon the special Contract; and to say, that because he depended upon Defendant's Word at first, he therefore should have no special Bail, would be a Reason why there should be no special Bail in any simple Contract. And here special Bail was ordered; and it was said to be so ordered in like Cases in Common Pleas. Special Bail
on special *Assumpsit* for Money won at Play.

Ante p. 258.

D E

Term. Sanct. Mich.

Anno 11 W. III. 1699.

Fisher versus Wiggs.

Salk. 391.
A Copyhold
was surren-
der'd to his
five Children,
equally to be
divided be-
tween them,
held a Tenan-
cy in Common
by two Judges
against *Holt*.

Litt. Rep.
346.

A. Seised of a Copyhold Estate in Fee surrendered it to the Use of the Wife for her Life; the Remainder to his five Children, equally to be divided between them and their respective Heirs for ever; and the Question was, whether this was a Jointenancy or a Tenancy in Common; and *Carthew* would have it a Tenancy in Common; for it being a Surrender to Use, it would receive the same Construction with a Use at Common Law, which is not to be compared to a Grant by Deed, but more to a Will; in which clearly this would be a Tenancy in Common; and the Reason is, because the Intent is apparently so; and Law will construe Wills according to Intent, if consistent with Rules of Law; and it ought to be so in like Manner in Case of Uses, which were dirigible and governed by Equity; and now executed by the Statute as Chancery would have done before; and sure a Court of Equity would consider a Use at Common Law, if declared in this Manner, to be in Common, and not joint; and for supporting Intent of Parties he quoted *Lit. §. 296, 298. Dy. 361. 2 Leo. 72. 3 Co. 37. Lit. Rep. 46, 47. Cro. Car. 75. 1 Leo. 257. Cr. El. 695, 696.*

Northey, since Attorney General, *contra*. Surrender of a Copyhold Estate is a perfect Grant, and to be pleaded as such, and therefore to be construed like other Grants. *1 Cro. 366. Jo. 340. No Difference between Surrender and Grant. Poph. 39. Surrender and Grant, idem. 2 Bulst. 272. 2 Cro. 376. Cro. El. 29.* So the Words *equally to be divided* here shall

shall be void; and the Law favours Jointenancy more than Tenancy in Common; the one preserving the Estate intire; a Thing the Law delights in; and the other dismembring it, which Law abhors; and for this Reason it is that the eldest Son runs away with all. And where a Thing is given by joint Words, it shall not be made common, without exprefs Words that make an absolute Division; but an Intent that they shall be divided will not do. 5 Co. 19. a. A Man granted three Acres of Land to three, which is a joint Estate; and after, in the same Deed, covenants with them *& quolibet eorum*, which should seem to shew his Intent to have been, that they should have severall Estates, in Respect whereof he made a severall Covenant; yet that Notion was rejected. And the Diversity is manifest between a Deed and a Will; for in a Will the Testator, who is supposed to be destitute of Counsel, has his manifest Intent supported by Construction, if by Advice of Counsel he could have legally done it; but there is no Reason for such Favour in Case of a Deed, where the Parties might have taken Advice. If Lands be given to two, *Habend'* one Moiety to the one, and the other Moiety to the other, there the *Habend'* makes an actual Division; and nothing divides Jointenancy in a Grant, but what does it actually by the very Words thereof. 3 Cr. 330. pl. 5. *Equally to be divided* in a Will, was holden to be no Tenancy in Common; which Case, tho' in Truth not Law, yet it shews how tender the Judges were of Severing a Jointure. *Style* 211. *Equally to be divided* makes a Tenancy in Common in a Will, but not in a Grant. 2 Rol. Ab. 90. *Ward and Everard*.

Holt: There is no Difference in a Grant between giving Lands to five and their Heirs, and to five and their Heirs respectively, or to five and their respective Heirs. And without Doubt a Surrender of a Copyhold is a Grant, and to be pleaded as such. Surrender of a Copyhold is a Grant; and to be so pleaded.

This was again argued; and to have it a Tenancy in Common, the Rule in *Hob.* 277. that Judges ought to be curious and *astute* to find a Means to support Intent of Parties; which often makes Judges, in Constructions, transpose Clauses in Deeds, and split an Instant into Priority and Posteriority; and never adjudge without Reluctancy against Intent of Parties, especially in intended Provisions for Children; and *equally divided* and *to be divided* are the same; and here it cannot be equally divided to them and their Heirs, if it be made a Jointenancy. *Vide Style* 434. where *Popham's* Opinion is cited, that in Construction of Tenancy

in Common the Subject Matter is to be considered; and tho' strict Rules of Law ought not to be receded from in creating of Estates, yet it is not so in qualifying an Estate created. *Vide Hob. 172. Litt. 298.* A *Scilicet* qualifies an Estate of Jointenancy into a Tenancy in Common; and the Substance of the Premises is not hereby alter'd; and Tenants in Common have each of them the Land to his Use, as well as in Case of Jointenants; and if a *Scilicet* or *Viz.* which is called *Clausula ancillaris*, make a Jointenancy into Tenancy in Common; *a fortiori*, *equally to be divided to them and their respective Heirs* will do it; and there is not any set Form of Words necessary to make a Tenancy in Common. *Litt. §. 298.* If the Words here were, *each to have a fifth Part*, it would do; and *equally to be divided*, and *each to have a fifth Part*, is the same in Substance, tho' the Words be different.

It is true, as is objected, that the first Words are joint, but they make a Jointenancy only by Implication, which is controllable by subsequent express Words; as where Lands are given generally, that Implication of an Estate for Life may be enlarged into a Fee, or abridged into a Chattel, by subsequent express Words. So if Lands be given to two, *Habundant* to one for Life, the Remainder to the other for Life. *Dy. 12. Cr. El. 759. Mo. 667. Ow. 167. 7. S.* by Deed acknowledged to have received 20*l.* to the Use of *A.* and *B.* *equally to be divided*; *A.* dies, his Administrator brings an Action for a Moiety; and had Judgment, because of the Words *equally to be divided*: Much a stronger Case than ours, being of a personal Thing, harder to be severed; for if there be two Obligees of a Bond, and one of them is attainted, the King shall have all; otherwise in Case of Lands. *Telv. 23. 1 Brownl. 82.*

It was insisted upon, that strict Rule of Law is not to be adhered to in Case of Surrender of Copyhold. For there is hardly a more extensive Rule, or subject to fewer Exceptions, than that a Person not named in the Premises shall not take *in presenti*; and yet it does not hold in Copyholds. *2 Rol. Ab. 67. Fitz. 19. Poph. 125, 126.* At least Copyholds shall have the same Favours as Uses; and the Words in our Case would make a Severance of Freehold, in case of Use at Common Law. *2 Vent. 365.* Covenant to stand seised to Use of *A.* for Life, Remainder to Use of two Persons *equally to be divided*; adjudged the Remainder was in Common.

After in *Hill*. Term the Court argued *seriatim*; and *Gould* and *Turton* held it a Tenancy in Common. And *Gould* first cited the Opinion of C. J. *Richardson* in *Litt. Rep.* *Beck's Case*, that in Construction of Deeds, all the Words ought to have their Effect, if possible; and he said, he knew no Authority against making these Words to amount to a Severance of the Jointure; and therefore to reject them would be inconsistent with Rules of Construction: He confessed they ought to be strict in creating and limiting Estates; but that is only where there are express Words or Phrases made necessary by Law to the creating or limiting Estates. But here are no express set Words necessary to make a Tenancy in Common, or Jointenancy, but such only as shew the Intent of Party, which of them he designed. *Litt. §. 292*. So I hold, that any Words, that manifest the Feoffor, &c. intended they should have several Properties, will make Tenancy in Common; for it is neither a Creation or Limitation of Estate, but a Qualification of an Estate already created and limited; and therefore a Release from one Jointenant to another needs no Words of Inheritance; and joint Premises may be sever'd by *Habend*, because it only alters the Quality of the Estate. So that if it be apparent how Donor intended to have the Estate he gives qualified, such Construction, as maintains that Qualification, ought to be put upon his Words.

No express Words necessary to create Tenancy in Common, or Jointenancy, only such as shew the Intent.

If a Man devises his Land to one and his Heirs, it is a Fee; but if he adds, and if he dies without Heir of his Body, *A.* should have Remainder, this makes it an Intail. *19 H. 6. 74. pl. 41. 6 W. & M. in C. B. Blisset and Cranwell*. Devise to two Sons and their Heirs, and the longer Liver of them, equally to be divided among them after Death of his Wife; adjudged a Tenancy in Common, notwithstanding the express Jointenancy: And in a Will, *equally to be divided* and *to be divided* are the same Thing; and we are here upon the Construction of a Use, which is much to be compared to a Will.

Equally to be divided in a Will makes Tenancy in Common; and Construction on a Use much the same.

2 Rol. Ab. 67. A Surrender was out of Court, and Surrenderee takes a new Copy to him alone in the Premises, *Habendum* to him and his Wife; and tho' Wife by Common Law should not take, being not named in the Premises, yet this being of Copyhold Estate shall be good to both; so that Surrender receives a more favourable Construction than a Common Law Grant. I cannot cite a Case at large that has been solemnly adjudged; *Pasch. 32 Car. 2.* was indeed a Feoffment in Fee to two and their Heirs, equally

equally to be divided between them; but no Judgment entered, tho' all the Judges, except *Jones*, inclined to make it a Tenancy in Common; and *Jones* took the Difference between a Deed and a Will. 1 *Inst.* 190. *b.* says, if Verdict find that one was seised of a Manor *in tres partes dividend*, it is a Tenancy in Common; *secus* if it be *divisas*. *Telv.* 23, 24. same Case; and the same in *Mo.* and 3 *Cro.* That if an Interest be granted to three, equally to be divided, it will be a Tenancy in Common. *Dy.* 10. Grant to two, *Habend* to one for Life, Remainder to the other for Life, severs Jointure; and he said, the Authorities against him were notional Diversities between a Deed and a Will; but sure this is such a Deed as deserves as favourable a Construction as a Will, it being a Surrender to Use; 2 *Rol. Ab.* 90. *Style* 211, where it is said, that *equally to be divided* will not make a Tenancy in Common in a Deed, as in a Will, they are but the same Authority both; and tho' it were allowed for Law, yet is not like this; because it was a perfect Conveyance at Common Law, and this by Way of Use; where we must have Regard to the Intent; and the Words *respective Heirs* shew plainly he intended the Heirs of both should take.

Turton agreed *in omnibus*; and added, that Surrenders of Copyhold Estate were made in last Extremity, as well as Wills, and therefore more especially ought to have the same Favour; that this is a Provision for Children; that the Intent was manifest; and for that Reason, since no special Form of Words was necessary, they ought to make it a Tenancy in Common; if not for other Reasons; yet because it is a Use dirigible by Equity before the Statute, and now executed by the Statute, as the *Subpana* would have ordered it before.

Holt C. J. cont. My Brothers go upon two Grounds. The 1st, that in all Deeds this would be a Tenancy in Common. 2^d, That if it were not so in a Deed, yet it ought to be so in this Case, it being a Surrender of a Copyhold Estate to Use; and the Case they most rely upon is the additional Report of *Poph.* 125. and there it is uncertain whether the Wife be named; certainly no Body knows the Author of that Report, and it differs from 2 *Cro.* 434. And I hold against that Authority, that if a Copyholder surrenders to his Lord, declaring no Use, the Copyhold is in the Lord, and he may new grant it to him; and Grantee shall be in from the Lord, and not from Surrenderor; and to say that Copyhold Estate shall be otherwise construed than a Deed, is to contradict *Co. Copyhold Cases*; where it is resolved, that

that they are to be governed according to Rule of Common Law, if it be not where a particular Custom prevails; and in some Manors there is a Custom, that if a Surrender be to three, the first named shall take all for his Life, and so of second, &c. And by Custom of some such Manors, if the first Taker surrenders to Lord, he destroys all the other two Estates in Remainder. And if these Words *equally to be divided* signify any Thing, they signify no more than the Law would otherwise intend; for every one will have a fifth Part, and no Interest in the other Parts. 1 *Inst.* 186. a. One Jointenant cannot forfeit more than a Moiety, tho' they have a joint Freehold; yet if both of them join in a Feoffment, and one of them dies, the Feoffee must plead a Feoffment by them both. And *Litt.* §. 262. that Jointenants are in by one Title, and Tenants in Common by several Titles. 1 *Inst.* 189. Jointenants hold by one Title and one Right; as if Lands be given to J. S. and Bishop of *Norwich*, they are Tenants in Common; because they have it by several Rights, tho' by one Title. But Tenants in Common have divided several Freeholds and Inheritances, but a joint Occupation as well as Jointenants; and therefore if one Tenant in Common take all the Profits, the other has no Remedy, no more than one Jointenant would have in that Case against his Companion; so *equally to be divided* may go to the Possession which is joint in both Cases. As to the Addition of the Words, *and their Heirs respectively*, it is no more than what the precedent Words do imply, if they were out; as if Lands were given to two and their Heirs, it shall go to their Heirs respectively, that is, be indifferent to go to the Heirs of the one or of the other, till Survivor, and so *expressio eorum quæ tacitè insunt nihil operatur.* 8 Co. 139. Dr. *Drury's* Case, these Words *during the Term* are rejected, because understood if they were omitted; for the Grant would be the same without them; and in our Case, it being a Jointenancy, it is a Consequence that Survivor and Heirs shall have it.

Obj. *Litt.* §. 292. One Moiety to one, and the other Moiety to another, makes a Tenancy in Common, and distributed by one Deed.

Ans. Tho' it be indeed one Deed, yet they are distinct Conveyances; and Livery to the one, *secund' formam Chartæ*, will not avail the other; and in our Case, here is no Distribution, for *equally to be divided*, or *equally divided*, is repugnant to Tenancy in Common; but one Moiety to the one, and the other Moiety to the other, is of a Moiety

Copyholds to be governed by the Rules of Common Law, unless where particular Custom prevails. Ante p. 228.

Jointenants are in by one Title, Tenants in Common by several Rights.

Tenants in Common have a divided several Freehold, but a joint Occupation.

Tenants in
Common have
several Free-
holds undi-
vided; Join-
tenants but
one undivided.

undivided, and therefore a Tenancy in Common. But if twenty Acres be given, *Habend'* ten Acres to one, and ten Acres to the other, the *Habend'* is void; because the Distribution would be repugnant to the Nature of Tenancy in Common, which must only be of a Moiety, &c. undivided; And if these Words could signify any Thing, the Parties could not take till Division. *Co. Ent.* 413, 414. Moiety or third Part is *pro indiviso*, without distinguishing Jointenancy from Tenancy in Common. *Co. Litt.* 190. where it is said, that if Verdict find one was seised of two Parts to be divided; 1st, It is by Way of (*it seems*), and conjectural. 2^{dly}, It is not at all material to the Case of 21 *Ed.* 4. 22. which is only, that Verdict finding one seised of *tres partes divisas* is not to be taken for Tenancy in Common, but of a Severalty; and there is not a Word of *dividend'*, and therefore no Ground for the Distinction from that Book; and he means of a common Possession which may be between Tenants in Common, or Coparceners. *Hob.* 120. *Mo.* 868. *Small and Day.* Devise of Knight-Service Land to Wife for Life, which was void for a third Part, and it was enjoyed between her and the Heir during her Life, and the Possession was held joint; and that the Possession of one is the Possession of the other; and that tho' Tenants in Common have several Freeholds, and Jointenants but one, yet it is to be understood, that Tenants in Common have several Freeholds, but undivided; and Jointenants have one undivided Freehold. And as to Cases of Wills urged by my Brothers; sure the Construction of Wills is no Rule for Construction of a Deed executed in one's Life; for if Land by Deed be given to *J. S.* for ever, it is but an Estate for Life; but in a Will it would be an Inheritance. And the Case 27 *H.* 8. 27. Lands to one and Heirs Male by Will is an Estate-tail, but in a Deed it would be Fee: and the Reason of this Diversity is, that the Law which allows him to devise, will consider his Circumstances, and not hold him to strict Rule of Law: And this was the Common Law, where one might devise by Will in Burroughs and Towns, and was practised before 32 *H.* 8. *Vide* 12 *H.* 6. f. 12. Devise to Infant *in Ventre sa mere* is good, by the same Reason, but Grant would be void; and so Wills being now made generally allowed shall have the same Favour; and the Reason of a Case is the Strength of it; and *Ratcliff's* Case does not say that these Words make a Tenancy in Common, but only that it is a Manifestation of the Party's Intent that there should be no Survivor: And he agreed the Case of a Devise by Implication of 13 *H.* 7. as Devise

Devise to a Man's Heir after Death of *J. S.* and *Hob.* 24. *A.* by Will makes *B.* his Heir, which no Body can do, yet it is a good Devise. 1 *Cr.* 366. A Diversity between Will and Surrender. 2 *Rol. Ab.* 90. Devise to two Daughters *equally to be divided, Habend'* to them and the Survivor, and the Heirs of the Body of the Survivor; adjudged a Jointenancy, because of the subsequent Words, which do not contradict the Words *equally to be divided*; for if they had, they would be rejected; for if they had made an express Tenancy in Common, the subsequent Words would be void. *Style* 211 & 434. Same Case. Devise to two and their Heirs respectively; and it was long before these Words would make a Tenancy in Common in a Will. *Dy.* 25, 128. *Bendl.* 19. 3 *Cr.* 330. which sure are strong Arguments, that the Law was taken clear in those Days, that it would not be a Tenancy in Common in a Deed, when the Doubt was so great in a Will. 3 *Cr.* 695. it is laid down as a Ground, that it will not make a Tenancy in Common in a Deed as it will in a Will. And seeing these Words will not make a Tenancy in Common, in Rigour and Strictness, there ought to be no Straining to make a Jointenancy into Tenancy in Common; for Jointenancy is favour'd in Law; for it hates Fractions of Estates, and Multiplication of Tenure is upon this Ground; for if the Tenure be by a Horse, and Land comes to two Tenants in Common, they shall both hold by a Horse, 6 *Co. Bruerton's Case*; and so it would be here; for every fifth Copyholder would pay a Fine, if this were a Tenancy in Common; and this I take to be the Reason that Fractions of Estates are hated in Law: And as to the Case of 22 *Car.* 2. it was a Rule *nisi* by two Judges against one, and at another Day the Rule was discharged, and the Matter ended by Death of one of the Parties; and that is no Authority against me; and the constant Opinion of Lawyers both from Bar and Bench are with me; but my Brothers make the Majority, therefore let Plaintiff have Judgment.

Parry versus Villars.

TWO Bail had entered into a Recognizance in the Common Pleas, whereby *recognoverunt & quilibet eorum recognovit* to be indebted 2000*l.* to Plaintiff, upon Condition, that Defendant in an Action there should pay principal

Writ of Error out of *C. B.* the Writ was right, but the Judgment ill entered; Court done in *B. R.*

inclined it was a good Ground for the Common Pleas to amend, but cannot be

Debt,

Debt, or render his Body, &c. *Sci' fac'* brought after Judgment against the Bail, to which Bail pleaded no *Capias* against Principal; to which there was a Replication; and Demurrer; and Judgment for Plaintiff, *quod recuperet separales summas* of 2000*l.* against them; and upon Writ of Error, this was assigned for Error, *viz.* that the Writ of *Sci' fac'* demanded Judgment only of one 2000*l.* which was all they were bound for, and the Judgment was for two several Sums of 2000*l.* and so a Variance; and for this was quoted 1 *Sid.* 239.

And Court agreed this was Error; but doubted whether, the Writ being right and Judgment ill entered, this Fault in the Entry were not amendable; but they agreed this could not be done here, it being a Record of Common Pleas, which this Court must take as they find it. And the Way to have entered the Judgment here had been to enter it for 2000*l.* against two *separaliter*. *Palm.* 546. 2 *H.* 4. 13. but they inclin'd, that the Writ being well was a good Ground for Amendment in the Common Pleas.

The King versus Kirk and Cage.

A Person indicted for Murder fled, and after surrender'd, and gave Notice to the Prosecutor's Clerk in Court, that they would move for Trial: Prosecutor shall not be hurried to Trial.

P*Opham*: *Convoy*, alias *Seymour*, having a sudden falling out with *Kirk* in *St. James's Park*, after hot Words and some Blows there, *Seymour*, *Kirk*, and one *Cage*, *Kirk's* Friend, immediately walk'd out of the Park, and *Seymour* in his Way took up one *Morely* as his Friend with him; and as soon as they got out of the Park they all four fought, where *Seymour* received a Wound from *Kirk*, which put him into a Fever, whereof he died; whereupon *Kirk* and his Friend *Cage* fled. The Coroner's Inquest found this Murder, and a Bill was likewise found by the Grand Jury; and Process thereupon; and *Non est inventus* return'd; after in the Vacation, they having surrendered themselves, gave the Prosecutor's Clerk in Court Notice, that they would move the first Day of next Term to have a Trial; and upon that Motion the Court *seriatim* delivered their Opinions.

Gould: Here is a Murder found by Coroner's Inquest, and a Trial ought not to be spurr'd on specially, where there is no affected Delay in Prosecutor; and here they fled from Justice, but after surrendered, and lately gave Notice; and their Surrender ought to be reckoned from the Notice given, since when

when there is not sufficient Time for Prosecutor to prepare.
Ideo no Trial.

Turton: Liberty is one of the Darlings of the Law, wherefore there ought not to be an affected Delay of Prosecution; but here it is their own Fault that they are not tried sooner, for why did they fly; and I am not satisfied that Notice to Clerk in Court is good here, but there ought to be immediate Notice to the Prosecutor, and no Difficulty ought to be put upon a Prosecution.

Holt: The Trial ought to go on, not out of Favour, but of Right; for by Law of the Land Malefactors ought to be brought to Punishment in convenient Time for publick Example; and it is five Months since Fact was committed, and it was almost in the Face of the Court; and sure five Months is convenient Time: Then as to their Flight, that ought not to be made an Ingredient, for they incurr'd the Penalty of the Law for that already, *viz.* the Forfeiture of Goods and Chattels in case of Acquittal. And as to the Point of Notice, the Prosecutor ought to have been in Court at the Return of *Non est inventus*, to take a new Process, and so have Notice of Surrender; and the not doing whereof argues his Laches. *Vide 3 H. 7.* A Statute for Speedy trying of Murderers, which is not in Favour of Offenders, but to bring them to Justice: And there has been Neglect in Prosecutor, even since Notice given, for that was on tenth instant, and this is now the twenty-fourth; then it was moved they should be bail'd; but *Holt* said, since Trial is put off for Default in them, there is no Room for Bail without some special Cause. And he order'd it to be made a Rule of Court, that the Witnesses be bound over to appear against the Prisoners next Term.

Note; In this Case it was granted, that some of grand Jury who found the Bill might be of petit Jury: And *Holt* said, that the Evidence sworn before Coroner could not be offer'd here, if they might have the Witnesses themselves. And tho' their going out of Park was by mutual Consent, and tho' they had done it for more Conveniency, yet it being *upon a sudden falling out*, and in Pursuance of that Heat, it cannot be Murder; nor is it material who drew first, since both had Weapons drawn; and if *Kirk* be guilty, *Cage* must be so too; and it may be a Question whether *Morley*, tho' the Deceased's Second, be not so likewise: And tho' Wound were not the immediate Cause of *Seymour's* Death, it suffices that it be the mediate Cause.

Persons on the
Grand Jury
who found In-
dictment, may
be of Petit
Jury.
2 Jo. 53.
Keyl. 55.
1 Sid. 277.
Keyl. 56.
Crompt. Just.
P. 25.
3 Inst. 51.

Keyl. 26.

Richardson and Seise.

Feme Covert
cannot make
Will without
Consent of her
Husband.

FEME Covert by Consent of Husband makes her Will, and another Feme Covert her Executrix; her Father, upon Oath of her dying a Widow, obtained Administration; and being cited below by the Executrix to have the Administration revoked, moves for Prohibition, upon Suggestion that she was covert at Time of Death, and has Rule *nisi*; and the Matter being open'd to Court they discharg'd the Rule: And *per Holt*; a married Woman cannot make a Will, even as Executrix, without Consent of Husband. *Ro. Ab. Executor* 912. If Feme be Executrix and Legatee, Administration *de bonis non* ought to be to Husband; if she be not Legatee, and others are, it ought to be given to them; if there be no Legacies, to next of Kin to first Testator.

Post Mich.
12 W. 3.
Dubois v.
Trant.

Pasch. 13 W.
3. Thorp v.
Thorp.

1 Jo. 249.
201.

1 Vent. 217. *per Holt*.

Note; Papist convict cannot be Executor; *secus* he may;

Child versus Harvey.

Trial set aside.

THE *Nisi prius* was *Die Luna in mense Pasch.* and no such Day could be that Year, wherefore Trial was set aside. *Vide* 2 R. 3. *Cr. El. Webly v. Mozely*, 9 Ed. 4.

Turner versus Main.

Not saying
where Con-
version was,
cur'd by Ver-
dict.

Action upon the Case by Assignee of Commissioner of Bankrupt, setting forth, that the Bankrupt had recovered such a Sum against Defendant's Testator, and that Execution remained to be done, and Debt was assign'd to Plaintiff; and that Goods to such a Value of Testator came to Defendant's Hands, which he converted to his own Use. After Verdict it was moved in Arrest of Judgment, *first*, 'That it was not laid where the Goods came to his Hands, or where Conversion was; but *non allocat*', because tho' the Execution would have been good on Demurrer, yet now it was not material after Verdict.

Chancery may
refuse to grant
a Commission
without Peti-
tion, but if do,
is good.

2d Exception, Because not said that this Commission was obtain'd upon Petition in Writing, as Statute directs; *sed non allocat*'; for tho' Chancery may refuse to grant a Commission without Petition in Writing; yet if they will do it, it shall not

vitiare; and this may be a supplemental Commission, which requires no Petition in Writing.

3d Exception, That it was not said in the Declaration, that the Money was not paid to Bankrupt before Act committed; but *per Cur'*, saying that Execution remain'd to be made, supplies that; and Plaintiff had Judgment.

Lenox versus Boddington.

ONE pleaded a foreign Plea after Imparlance, which could not be; but it was objected, not to be after Imparlance, because there was no Entry of *defendit vim et injuriam*: But *per Cur'*, that is not necessary to an Imparlance. Imparlance, not necessary to have Entry of defendit vim.

Marley and Blunt.

IT was pleaded to an Action in this Court, that there was another Action for the same Cause depending in Common Pleas; *nul tiel* Record pleaded; Rejoinder, that Defendant had discontinued the Action in Common Pleas; and to that Demurrer, and *Resp. ouster*. Action discontinued, is not Action pending.

Bromesfield versus Snoke.

THOU hast no more but what thou hast got by cozen- Words. ing and cheating; not averring that he was of any Trade, or that he had any Thing; not actionable: *Per Cur'*.

Pierceson versus Hulls.

ERROR assign'd of a Judgment from Common Pleas, that there was a Miscontinuance, the Continuance being from one Day to another in the same Term; which, as was urged, could not be, Term being but one Day in Law; *sed* overruled; another Error was, that the Time of Imparlance was to *quind. Pasch.* instead of a *Die Pasch. in quindecim Dies, quod etiam fuit rejectum per Cur'*. Continuance may be from one Day to another in the same Term.

Moisy versus —

Indebitatus for
Goods, not
faying fold.

I *Indebitatus* for Goods had from Plaintiff, without faying fold, and that moved for Exception, but over-ruled; for *per Holt* it would lie for Rent or Bond.

The King versus Burrough of Abingdon.

Salk. 431.
Mandamus.
Return ought
to be by the
Mayor, with
the Consent of
the major Part
of the Corpo-
ration.

Ante p. 126.
Sheriff may
disavow a Re-
turn made by
another Per-
son in his
Name the
same Term.

IT was a Return to a *Mandamus*, the Filing whereof was opposed upon Affidavits of several Burgessees, that it was made by the Mayor in the Name of the major Part of Corporation, without Consent of them; it was agreed the Return ought to have been by Consent of the Majority of the Corporation, for they ought to answer the Writ, to whom it is directed; and it being directed to the whole Corporation, it ought to be answered by the whole Corporation, that is by the Majority of them: And *Holt* said, if a Writ comes to Sheriff, and another make a Return to it in his Name, the Sheriff may come and disavow it the same Term, but not in a subsequent one. *Dy.* 182. So here will be two Questions in this Case. 1st, Whether we ought to admit them to disavow this Return? 2^{dly}, In case we do it, whether they ought not to do it in proper Persons? For to examine here, upon Affidavit, how that Fact stands, is without Example; but we will handle that Person roughly that shall make a Return in the Name of the Majority without Consent; for as they can't make a Return, tho' they are the Majority, without the Mayor; so Mayor cannot make a Return without Majority of them; and the Return must come by Mayor's Hands into Court.

If by Charter
Election is to
be on a par-
ticular Day,
nothing will
excuse it.

Note; By their Charter they are impower'd to proceed to an Election on such a Day; and *per Holt & Turton*, if they do not choose on that Day, they cannot do it the next Day, for they must pursue their Patent, and that gives Power only for one Day; and tho' the Mayor be sick, so as he cannot officiate that Day, there is no Remedy; and *Turton* said, that in such a Case they were forced to petition, in Case of Corporation of *Norwich*; and they said, they had known a *Quo warranto* gone against a Corporation for choosing at another Day. But *Wright*, then King's Serjeant, and since Lord Keeper, was strong against this Opinion; and at last an In-
formation

formation was filed against the Mayor for making a false and undue Return; and the principal Point was not determined.

Note; *Kirk* was brought up by Rule in Hopes of being bail'd, his Trial having been put off as before; and *Lach* 12. & 1 *Bulst.* *Egerton* and *Farrington* was quoted, but Court remembred *Coke's* Saying in *Bulst.* That they had Power to bail one in case of Murder, but he would not exert it without special Command from King; and that *Hale* used to say it rarely or never ought to be done; so he was remanded, there being two Indictments of Murder against him.

Court may bail in Murder, but very seldom do.

King versus Fuller.

IT was a Conviction upon Statute of 8 W. 3. c. — the Complaint was laid to be made on the thirty-first of *March*, and Conviction was on the third of *April*, and was, that he *modo habet et adhuc tenet*; and for this it was quash'd, for that a Fact on one Day could not be on another Day.

Burch versus Scory, at Nisi prius, coram Holt.

TRover for Goods; to which it was pleaded by Defendant, that he had bought them in Market overt. *Holt*: You must prove the Sale in Market overt, and at a convenient Time. If Goods be bought upon Liking, the Vendee must return them, otherwise his detaining, or not sending them back, is sufficient Evidence of a Liking; so if he declares his Dislike, but after disposes of them; so if Goods be sold on Liking, and before the Day on which Party by the Agreement is to return them, he sells or disposes of all or Part of them, it is a Liking; and Time of Liking or Disliking of Goods is eight Days by Act of —

Sale in Market overt must be at a convenient Time.

Hart versus King.

A Bill of Exchange was protested, and lost, and Action brought against Drawer; and it was proved that Defendant had own'd he had drawn the Bill; and held good 4 K by the Drawer liable; and Notice should be given of the Protest to Drawer in convenient Time,

Bill of Exchange. In foreign Bill of Exchange the Protest makes

by *Holt*; and he said, that this being an outlandish Bill, Drawer was made liable by the Protest; but no Protest necessary in case of inland Bill: And that to make Bill payable to one's Order was the same as if it were to him or Order; and he said, that if Defendant could make it appear, that he was at any Damage for Want of Notice of the Protest, as if Drawee had failed in the mean Time, &c. it would be incumbent upon Plaintiff to prove Notice given of the Protest in convenient Time.

Bignoll versus Rogers.

Debt against Sheriff for Reward given, on Conviction of Clippers and Coiners.

Judge's Hand to a Certificate of Conviction to be prov'd.

Interrogatories to be put in within a Week, else the Recognizance is discharged of course.

IN Debt against Sheriff of *Bucks*, for the Reward given by the Statute 6 & 7 W. & M. to those that should discover and convict Clippers and Coiners. *Note*; Here Plaintiff had a Certificate from my Lord C. J. *Holt*, who tried the Malefactor, of his having been convicted on the Plaintiff's Evidence; which being produced, tho' under my Lord's Hand, yet it was proved by my Lord's Clerk to the Jury. And here *Holt* held the Demand of this Debt of Sheriff, after the Certificate, did attach the Debt upon him; and that the Money was to be paid out of the Profits of County, or, upon Failure thereof, out of Exchequer; and that in such Case the Action would lie against the Sheriff's Executor, because given by Act of Parliament, and attached in Testator; but for the Penalty given by the Act against the Sheriff for Default of Payment, that should not affect the Executor; and that if Sheriff pay'd the Debt and died, it should be allow'd to his Executor.

Holland an Attorney of the Court inform'd his Client that he had entered up Judgment two Years before, but could not sue Execution, by Reason of Writ of Error pending, when in Truth there was no Judgment entered; and for this notorious Practice was ordered to answer Interrogatories; and here it was agreed, that if Interrogatories be not exhibited in a Week, the Recognizance entered into for answering them is discharged of Course. It was likewise agreed by Court, and Sir *Sam. Ashtree*, Master of Crown-Office, that in all Cases the Party has four juridical Days to answer the Interrogatories, tho' they be exhibited in Vacation; but if he does not answer in that Time, he is to be committed upon Motion.

Per Holt; If a Man be excommunicated, a Prohibition shall assoile him.

Anonymus.

IN Trover the Case was this; the King's Orders were issued Trover, upon disbanding of the Army, that each Trooper should retain his Horse; and this was against a Captain, who in Breach of the said Order had taken the Trooper's Horse; and held that Trover lay for the Trooper in this Case; for tho' before the Property were in the King, yet by the Order it was vested in the Trooper, he having the Possession at that Time.

King versus Laurence.

AN Information was filed against him for writing a Letter Information for writing a Letter. to Sir *John Pigot*, desiring him to moderate his Zeal, for that the King, meaning King *James II.* would be soon restor'd; and that for further Satisfaction herein, he would soon hear that many Lords would repair to him to *France*; what to do he might guess: And being found guilty he was fin'd twenty Marks, and committed till Payment.

Steward versus Floyd.

UPON Writ to Sheriff he first made Warrant to Bailiff Action against Sheriff for false Return. of Liberty, and after to his own Bailiff, who arrested the Party, and suffer'd him to escape, and then Sheriff return'd *mandavi Balivo*; upon Affidavit of Fact Sheriff was order'd to attend, and agreed Action lay against Sheriff for false Return, as *non est invent'*, &c. and his Amercements were estreated.

King versus Slaughter.

HE was indicted upon 5 *El.* for using the Trade of Felt- Trades. monger, not having serv'd seven Years to it; and it The Trade of a Feltmonger. was moved to be quash'd, for that it was not a Trade known at Time of making the Statute. *Vide 2 Cr. 499.* That Hemp-Dresser was not a Trade within the Statute. But after

Vide 1 Sid.
269.

ter a Rule *Nisi* had been obtained, *Holt* said that it were fit for a Jury to try whether it were a Trade then or not; and why not as well as try a Prescription, and therefore was against quashing it upon that Exception; and he affirm'd that the Trade of Wool-comber was within the Statute, tho' Contrary had been adjudged, 4 *Ja.* 2.

Trevanion versus *Tooker*.

Judgment a-
mended.

A Plain Mistake of Clerk in entring up of Judgment was amended in the next Term, by Consent of Party for whose Advantage the Mistake was; *Ex motione Carthew*.

King versus *Tooley*.

Motion for
Attachment
for not obey-
ing a peremp-
tory *Manda-*
mus.

Ante p. 257.

HE had been a Mayor of a Corporation, and declined swearing in the Mayor Elect; and after a peremptory *Mandamus* an Attachment was moved for against him, upon Affidavit that he kept out of the Way, so that there could not be a personal Service made to him; and that Writ had been left at his House; and ordered he should shew Cause, &c. And Difference taken between this and the Case where Money is to be paid on Award; for there there ought to be personal Notice before Attachment; *sed quare*, if it be not *par ratio*.

Dillon versus *Walcott*.

On Reversal
of Attainder
of High Treason,
the Tertenants
should be served
with *Scire Facias*.
Ante p. 96.

THE Defendant's Attainder of High Treason being revers'd for want of Words *ipso vivente* in that Part of Sentence, which concerns the Burning of his Bowels; and the Judgment of Reversal being affirm'd in Parliament, Restitution was awarded by *K. B.* in *Ireland*, without any *Sci. Fa.* against Tertenants of Patentees of *Walcott's* Estate; and Writ of Error brought into *K. B.* hither, and this clearly allow'd to be a good Error. But *Northey*, since Attorney General, excepted against the Writ, because it did not appear by it, who were Parties to the Award of Restitution; for if the Award of Restitution be revers'd, there must go a *Sci. Fa.* against the present Tertenants, which cannot be if it does not appear by the Writ who they are.

And concerning awarding Execution in *Ireland* upon Re-
 versal or Affirmance of Judgment in *England*, were quoted Ante p. 225
Kel. 118. 3 *Keb.* 44. *Thesaurus Brev.* 165. and that Chan-
 cery cannot impower the Courts of *Ireland* by *Mittimus*,
 were cited *Kel.* 29. *Vaugh.* 393.

A. is in Execution at Suit of *B.* and charg'd with Action at
 Suit of *C.* who obtains Judgment; he ought to charge in Ex-
 ecution by *Committitur*, and not by *Ca. Sa.* but he may have
Fi. Fa. but *Q.* if, after he has charged him by *Committitur*,
 he may have *Fi. Fa.* he continuing so in Execution: By
 the Statute, if one in Execution by *Ca. Sa.* escape, Plaintiff
 may sue *Fi. Fa.* A Person in Execution, how to be charged.

Action for Words was laid in *London*; and an Affidavit
 for changing Venue was, that if any such Words were spoken
 by him, they were spoke in the County of *Lancaster*, &c.
 and because the Court could not order a Trial there, it being
 a County Palatine, they changed the Venue into the next
 County, *viz.* into *York*; tho' the Proof lay all upon the
 Plaintiff, who had all his Witnesses in *London*; and that
 Defendant could not prove a Negative, *viz.* that he had
 not spoke the Words, otherwise than indirectly, by producing
 those that were in the Room at the Time; and that they
 did not hear any such Words, or that no such Discourse
 was, &c. Venue Chan-
 ged to the next
 County to
 County Pa-
 latine.

Declaration in Ejectment had been delivered to one to
 whom the Keys were given to let the House; and *per Cur.*
 not good, because it should be to the Tenant in Possession;
 and he is only a Servant, and Plaintiff is not without Re-
 medy, for he may sign a Lease on the Land. Ejectment
 served on the
 Person who
 had the Keys.

Dair versus Earl of Stamford.

SIR *Bartholomew Shower* moved for a Prohibition to the
 Court of Chancery, upon a Writ of Sequestration out of
 that Court, whereby Lands were sequestred; and suggested
 that the Chancery was only a Court of Equity, having only
 Jurisdiction over Persons in case of Disobedience to their De-
 crees, and not otherwise; and he affirm'd, that tho' it were
 call'd the High Court of Chancery, yet if it should go a-
 gainst Law, or exceed its Jurisdiction, they were under Con-
 trol of *K. B.* for they upon *Habeas Corpus* will deliver one
 it. Motion for
 Prohibition to
 the Chancery.

illegally committed by them: And he said, that at first these sort of Sequestrations were only granted in case of personal Duty concerning Land; but they ought not to sequester Lands for Debt arising upon a personal Contract not concerning the Land sequestred.

Holt: You move for a Stranger to the Bill and Answer, and Proceedings in Chancery; and therefore you must take your Remedy at Law: You don't tell that you have brought Trespass against this Sequestrator, and that they stop you by Injunction out of Chancery; and no more was done in this Matter.

Note; I have heard the Master of the Rolls say, that that way of Sequestration seem'd now to have the Countenance of an Act of Parliament, for that the Statute of —W. 3. did recite it, and allow'd it. *Vide Statute.*

King versus Taylor.

Information
for offering to
buy Votes for
Parliament
Election.

LEave was granted to file an Information against one for offering to buy Votes, in order to Election of Parliament.

King versus Chaloner.

5 Mod. 446.
Carth. 501,
508.
Salk. 378.
Constable re-
turns he has
no Distress in
the County at
large; ill.

CHALONER was convicted upon the Statute of 3 & 4 W. & M. c. 10. of Deer stealing, upon an Information exhibited against him before a Justice of the Peace for killing several Fallow Deers, &c. *contra formam Stat.* by which he had forfeited 30 l. for each Offence; that upon Non-payment Warrant was issued against him, directed to all Constables of the County, to have the Money levied by Distress; and the Constable of *Dale*, which appear'd to be another Parish than that where C. was an Inhabitant, return'd that he had nothing in *Dale*, or any where else in the County; whereupon the Justice committed him to Prison for a Year, and to stand on Pillory. All this appearing on *Habeas Corpus*,

Eyres moved to have him discharged; for the Foundation of the Commitment is his having not wherewithal to satisfy the several thirty Pound's in the same County; and that is to be made apparent by a Warrant to levy the same, which if illegally awarded or executed, the Commitment is illegal; and all, that shews want of Distress here, is the Return of

Constable of *Dale*, that he hath no Distress in his Parish, or in the County; a Matter not lying in his Knowledge farther than within his own Parish.

Another Exception was, that the Conviction was on the eighth; at which Time he might have sufficient whereupon to levy the Penalty, and the Warrant not made till several Days after; and by Statute he is not committable, but for want of Distress immediately after the Conviction; and therefore the Warrant ought to be made immediately upon Conviction. *Ideo* this Warrant illegal.

And it was agreed *per totam Curiam*, that he was not to be imprison'd, but upon Failure of Payment and Distress.

Sir *Barth. Shower* and *Northey contra*; there is no way for Justices to know the Want of Distress but this; they cannot direct their Warrant to Sheriff who is the universal Officer of the County, because he is no Officer to execute a Warrant; but their proper Officer is a Constable; and the Warrant being directed to all Constables, and delivered to one, it is the same Thing as if it were deliver'd to every one of them in particular; and the Justice cannot enquire by Jury as a Sheriff may, whether the Offender has Distress or not; so there is no other way but this which has been taken. And a Constable indeed is not compellable to execute a Warrant out of his Vill, but may lawfully do it if he please, and shall upon Not guilty in false Imprisonment give such a Warrant in Evidence: And if an Inhabitant of *Clerkenwell* commit Felony in *Islington*, it is a good Exception to an Indictment against him, that he *of Islington*, &c. in County of *Middlesex* did, &c. *Egerton* and *Morgan's Case*.

Or if that be against us, it will be well enough this way: All the Statute requires is, that Justice of Peace may make his Warrant to levy, &c. by Distress; and so any Man, to whom such Warrant is directed, may execute it, and is a good Officer to that Purpose; and so this Warrant shall be taken to be made to this Constable, not *quatenus* Constable, but *quatenus* a special Officer for that Purpose; and if he made a false Return, they have their Remedy against him by Action: And can it be imagin'd they should stay for a Return from every Constable in the County, for the Statute impowers to detain the Offender for two Days, that in the mean Time they should know whether he has Distress; which shews it must not appear by Warrant, and Return thereof from every Constable in the County, for that is not practicable in so short a Time; and this being a Penalty, it lies upon the Offender to exempt himself thereof, by shewing where he has a Distress.

Holt;

Holt: Your Commitment is not pursuant to the Statute; for that is indeed that there should be a Warrant made by the Justice to levy the Money by Distress, and a Return thereof made; but not, that if it should be return'd, that he has no Distress, that thereupon he should commit him; and here the Commitment is a Judgment; and therefore you ought to be satisfied that he has no Distress, and make a Record thereof, and say, For as much as it does appear unto me, that he has no Distress, I do hereby, &c. *Vide Doctor Bonham's Case, 8 Co.* For what Authority has the Constable of *Dale* to return that he has no Distress in the County at large. No doubt a Warrant to all Constables is a Warrant to every particular Constable, and every one of them is bound to execute it in his particular Jurisdiction. And when a Warrant is directed to a Constable by Name of a Constable, it must be intended to be directed to him as Constable. *Gould* seem'd to incline, that if this had been a Warrant directed to the Constable of the Vill where the Offender liv'd, and he had return'd that he had nothing in the Vill, it would have been well. But the Prisoner upon this Exception was discharged.

Colour remedied by Replication.

Per Holt: If in Bar Defendant fails of giving Colour where it is necessary to give Colour, that Omission is remediable by Plaintiff's Replication; for he ought to take Advantage of lack of Colour before he replies.

Stringer versus Alison.

Postea 318.
Where Courts held, should be set forth.

PER *Cur'*, where any Thing is set forth to be in *K. B.* or *Chancery*, it ought likewise to be set forth where those Courts were kept; and 27 *H. 6.* 10. a Writ was abated for want of it.

Newton versus Rowland.

Attorney Executor not to have Privilege.

DEBT against an Attorney as Executor, who pleaded his Privilege, &c. and upon Demurrer it was urged for the Defendant, that the Reason of Privilege in that Case was in respect of his personal Attendance, which was equal whether sued in his own or *in auter droit*; but *per Holt*, the Authorities are of the other Side in this Case; and Plaintiff had Judgment *nisi*.

Earl of Kent versus Walters.

IN Trover for several Loads of Wood, and Judgment by Writ of En-
 Default; and Writ of Enquiry executed; it was moved quiry set aside:
 to set aside the Writ of Enquiry; upon *Affidavit*, that She-
 riff refused to receive any Evidence of the Value of the
 Wood, but directed the Jury to find the full Damages de-
 clared of; and for that it was set aside, upon Payment of
 Costs.

And in this Case *Northey* said, that Lord might cut Trees
 on Copyhold, by general Custom of Copyhold; or else, if
 it were Copyhold in Fee, that Wood could never be cut;
 which would be inconvenient.

But *Holt*: Sure he cannot, for the Copyholder has the
 same Interest in the Trees that he has in the Land; and I
 always have taken it so.

King versus Patting.

HE being convicted of a Riot, before Judgment upon On Convic-
 the *Postea* returned, moved to submit to a Fine; and tion of Riot
 having shewn by *Affidavits*, that the Riot was in resisting submitted to,
 one, who, by Pretence of Process of the Admiralty, would a Fine dis-
 seize on Goods he had distrained for Rent, he was discharged.
 And *per Cur'*, the *Postea* ought to be returned the next Term
 after the Trial.

Per Holt: Upon Writ of Error from Common Pleas, if On Error, if
 the Record certified be faulty, of common Right a *Cer-* the Record
 tiorari may go to certify the right Record. certified out
 of C. B. be
 faulty, *Cer-*

tiorari goes of common Right.

Chanler versus Driver.

A Submission to an Award being by Rule of Court, *Mounta-* Before Attach-
gue moved for an Attachment for Non-performance. *Cur'* ment granted
 There ought to be *Affidavit* of Award demanded, &c. and for Non-per-
 we never grant an Attachment for Non-payment of Money Award, *Aff-*
 upon an Award the first Day, tho' the Defendant be to do *davit* must be
 the first Act. of its being
 demanded.

Worley versus —.

Judgment entered on a forged Warrant of Attorney set aside.

Fine must be absolute.

Vide Keyl. f. 34.

Ante p. 316. If a Record be pleaded, it must be shewn where it is.

IT was found by Verdict, that a Warrant of Attorney was forged; and Judgment entered according to it was set aside upon Motion.

Per Holt: A Fine ought to be absolute, and not conditional; and therefore a Fine, unless such a Thing be done *in futuro*, is void. And by Common Law, a Fine for Non-repairing of Highway was for the Default in not repairing the Highway, and ought to be absolute; but by a late Statute the Fine is to go towards the Repair.

Per Cur': When a Man pleads a Record, he ought to shew where it is, that Court may have it; as if a Record of *K. B.* be pleaded, to shew it is *apud Westmonasterium in Com' Midd'*.

Corps versus Kitchen Hall.

Bail additional of what Term to be.

BAIL was put in in *Mich'* Term, and excepted against, and additional Bail put in in *Hill'* Term; and the Doubt was, if the additional Bail were of *Mich'* Term; and some said the Bail must refer to the Return of the Writ; and others would have it refer to the Recognizance entered into. The Mischief would be in this Case, to make the Bail refer to *Mich'* Term, that if Bail had aliened *bona fide* in the *Interim*, to have the Land charged with the Recognizance by that Relation.

Holt: It has been an old Question, whether Bail in this Court be liable from the Time of the Recognizance, or from the Time of the Judgment; and Court here ordered Proceedings to stay till they had considered of it.

Sherwin versus Sir Walter Clarges.

Trial at Bar in Ejectment

WHEN it does appear to the Court that a Suit is vexatious, they will not grant a Trial at Bar in Ejectment, without naming a sufficient Plaintiff.

And by Favour of Court one may have a Trial at Bar, tho' he sue *in forma Pauperis*.

Per Holt: If Vagrant be sent to the Place of his Birth, they may send him to the Place of his last legal Settlement. Vagrant may be sent to his last Settlement.

Richardson versus Williams.

Verdict in a Civil Cause may be given in Evidence in a Criminal Cause; but not *vice versa*; and Court said, they would hardly grant a new Trial, where a Verdict might become Evidence in a Criminal Cause. Verdict in a Civil Cause may be given in Evidence in a criminal one; but not *vice versa*.

Shoot versus Higgs.

BAIL upon Writ of Error cannot discharge himself upon Surrendering his Principal. Bail in Error cannot discharge himself on Surrender of Principal.

King versus Warburton.

IF Rule be for filing Information, and Non-process thereupon for Non-appearance of Defendant, a new one cannot be without a new Rule; for the first was executed; and here the Court gave a new Rule, upon Payment of Costs. Information.

Orby versus Pullen.

AN Avowry was, that J. S. being seised in Fee of such and such Parcels of Land, did by his Deed, &c. grant a Rent-charge of, &c. out of them *per nomina*, &c. *inter alia*, &c. and the Exception taken was, that the Avowant ought to name all the Lands charged, and not by Way of *inter alia*; for the Defendant might then plead Entry and Suspension, Extinguishment, &c. in Respect of the Parcels omitted; and it would be so in an Assize, for there all the Land must be put in View, and the Tenants all named. Avowry for a Rent-charge, whether all the Lands charg'd should not be named. Vide 7 Co. 3. a.

But it was offered *contra*, that indeed where the Grant is out of several particular Parcels in certain, there those Parcels ought to be certainly named in the Avowry; but where the Grant is general, there it will be enough to name one Place certainly, with an *inter alia*. *Vide Co. Ent. 590. 6 Co. 39. Finch's*

Finch's Case. 5 Co. 69. 1 Co. 54, 143. *Hearn's Pleader* 761. 1 *Saund.* 189. 2 *Saund.* 195. *Thoms. Ent.* 273, 276. *Winch* 951, 979, 1013.

And said, that Multitude of Precedents would make a Law. 3 Cr. 326. *Cr. Car.* 520. and *Bredon's Case*; but seem'd to approve of the Exception; for he said, that in Avowry it would be ill to say that he demised such Land *inter alia.* *Vide* 2 Cr. *Stoner v. Corbet.*

Duke of Ormond versus Ireland.

Carth. § 19.
Bond to follow the Suit with Effect is not forfeited by suing Injunction.

A Bond was given to Officer conditioned, that Plaintiff in Replevin would follow the Suit with Effect; after he sued an Injunction in the Exchequer, whereby the Proceedings were delayed. But *per Cur.*, that is no Forfeiture of his Bond; nor nothing else is, but absolute Determination of Suit, as *Nonfuit*, *Non prof.* &c.

Jennison versus Ellis.

Original of a different Term than the *Placita*, no Original.

WANT of Original was assigned for Error; and the Original certified being of another Term than the *Placita*, and no Continuance, the Court would not allow it for an Original. *Cr. Car.* 281, 272. *Yelv.* 108. That it must be an Original of the same Term with the Pleading, or at least pending the Pleading.

King versus Sergeant.

Non prof. against one Defendant no Release to the rest.

Verdict was against three jointly, and *Non prof.* entered as to one, and Judgment against the other two. *Vide* 6 *Ed.* 3. 31. 2 Cr. 211. *Co. Ent.* 172, 650, 676, 303, 699. that if there be several Defendants, a *Non prof.* against one is no Release as to the Rest. *Hill.* 3 W. & M. Rot. 759. *vide* *Hob.* 70.

Note. *Per Holt*: The Hustings is the County Court in London, and Sheriff may grant Replevin out of it as such by the Statute of W. 2.

Pierce versus Hutcheson.

DEBT was brought upon a Bond for Performance of Covenants; Defendant pleaded in Bar, that for all the Breaches till such a Time he had brought Covenant, and recovered Damages, and that there was no Breach since that Time; and Demurrer; and Judgment for Plaintiff; for by the very Plea the Bond was forfeited. Tho' *Carthew* objected, one might wave the Benefit of a Forfeiture of a Bond, as well as the Forfeiture of a Copyhold Estate, &c. and the Bringing of Covenant was a Waiver of the Forfeiture of the Bond, and so a Bar. But *per Cur'*, even in Equity it would be no Bar till Satisfaction; as if two be bound in a Bond, Judgment against one is no Discharge to the other before Satisfaction.

Bond for Performance of Covenants.

Postea Pasch. 12 W. 3. Duke of Ormond v. Briarly.

Upon Occasion of a Dispute between Mr. *Harcourt*, Secretary of the Crown-Side, and the Lady *Ash*, about the due Inrollment of a Deed, a Rule of Court was made, that all Deeds should be inrolled on the Plea-Side, and acknowledged in the Face of the Court.

Rule of Court.

— *versus Goudier.*

A. Avowed as a Bailiff for Rent; his being Bailiff not traversable: *Per Holt.*

Quære tamen.

King versus Shortell.

Indictment was for Rescous of one taken by Process of *Marshalsea*, said to be returnable *apud Westm' in Com' Surrey*; and for this it was moved to quash it; but Court would not intend but that there was a Place called *Westminster* in *Surrey*; therefore would not quash it.

Philips versus Bishop of Salisbury.

TWO Jointenants of an Advowson by Deed made a Partition to present by Turns; and after one of them granted over his Share; Grantee presents in his Turn, and the

Jointenants of an Advowson may by Deed make Partition of it.

the Bishop refused to admit his Clerk ; whereupon Grantee alone brought a *Quare impedit*.

Carthew objected, that the Inheritance of an Advowson was in its Nature indivisible, and as intire as that of a Villein; and that if two Jointenants of an Advowson agreed to present by Deed in their Turns, such Agreement would work no Severance of the Jointure, but that remained ; but if one of them after disturb the other, his Remedy was by Covenant ; and quoted 2 *Mod. Rep.* 97. And he said, that doubtless one Jointenant, or Tenant in Common of an Advowson, might make a voluntary Partition of the Right ; after which they shall have several Writs of Right of Advowson for their several Moieties. *F. N. B.* 62. If there be two or more Coparceners of a Manor, they may make Partition to have one Part of the Demesnes and Service to one, and another Part to the other ; and the Advowson by same Agreement to be by Turns ; it will be appendant to their respective Shares. 6 *Co.* 12. 2 *Rol. Ab.* 255. *Fitz. Tit. Quare impedit*, pl. 170. *Co. Ent.* 496. and accordingly it was adjudged for the Plaintiff at another Day *per totam Curiam*. 2 *Inst.* 362. *Dy.* 29. *Plowd.* 194. *F. N. B.* 62. 10 *H.* 4. 10. *Co. Ent.* 496.

King versus Higginson.

Mis-trial.

Indictment was for Maintenance, concluding *contra formam Stat'* generally, and the *Mittimus*, whereby the Record was sent to be tried in the County Palatine of *Chester*, was to try an Indictment for Maintenance *contra formam Stat'* of *H.* 8. And Maintenance being made penal by the Statute of *Articuli super Chartas*, and of — *R. 2. c. 1.* It was held the Matter was not duly tried, their Power by the *Mittimus* being confined to Maintenance by Statute of *H.* 8. and the Indictment being at large: *Per totam Curiam*.

In Case for false Return to a *Mandamus*, need not alledge they ought to obey it.

In an Action *sur Case*, for false Return to a *Mandamus*, against the Mayor and Aldermen of *Norwich*; it was objected, that it was not alledged that it belong'd to them to obey the Writ ; but *per Cur'*, by their alledging a Reason why they could not obey the Writ, they admit that.

Child and Idiot follows Father's Settlement.

Per Cur': The Child shall follow the Settlement of its Parent, unless he gains a distinct Settlement ; and before the Statute of 1 *Jac.* 2. an Idiot could gain a Settlement, for

for till then Notice was not necessary; but since he shall follow the Settlement of Father.

The King versus Inhabitants of Kingston Bowsey.

A Poor Person was sent by Order of two Justices from Parish of *St. Michael* to that of *K. B.* and upon Appeal the Order was quashed. And *per Cur'*, that Judgment shall not bind the Parish of *St. Michael* from sending him to another Place of Settlement.

Poor.
On Order of Settlement quashed, 'tis only final as to Parish concern'd.

King versus Hoskins.

Exception was taken to an Indictment for Rescous. 1st Because it was said, that it was without Consent of Sheriff; but it might be by Consent of Bailiff or Plaintiff. 2^d Exception, because the Arrest was not laid to be before Return of Writ; which was allowed good; and *Holt* upon this Occasion said, that a common Fine for a Rescous was four Nobles; and *Gould* said, that in Common Pleas they would have the original Action tried in a feign'd Issue, before they would let Action for Rescous go on.

Postea Mich. 11 W. 3. The King v. Warden of the Fleet.
On Indictment for Rescous, Arrest must be laid to be before the Return of the Writ.

Parish of Bloxom and Kingston.

AN Order of Sessions was quashed, for that it was, that the Person was likely to become chargeable, as we are credibly informed.

Order quashed, not being certain.

Parish of Grindon in Northamptonshire and Overcott in Warwick.

A Conditional Order was made, in case the Court of *K. B.* should be of Opinion, that, where a Servant was hired at a Fair ten Days after *Mich.* till *Mich.* next, such Hiring and Service did gain a Settlement, then, &c. and for this the Order was quash'd.

Order conditional quashed.

Hussey versus Fiddall.

Indebitatus Assumpsit by Assignee of Commissioner of Bankruptcy for Goods sold after Bankruptcy.

By Bankruptcy the Property is in the Creditors, and Assignee has the same Remedy as Bankrupt would have had.

Indebitatus Assumpsit for Money received on usurious Contract will not lie.

Vide 1 Sid. 223.

Indebitatus for Rent received from a Person's Tenants.

Common Bail being regularly filed, Oath of Debt being above 10*l.* not to be received.

ERROR of a Judgment in Common Pleas, in an *Indeb' Assumpsit* by Assignee of a Commissioner of Bankrupt; and the Exception was, that it was for Goods sold after Bankruptcy committed; and the Action should be Trover, and Debt would not lie therefore, because Trover might be brought for it again. But *Holt*; they may avoid the Sale, if they will, and bring Trover for the Goods; but if they bring the one, they shall not after bring the other. By Act of Bankruptcy the Property of the Goods is in the Bankrupt's Creditors; and if it be a Chose in Action that is assigned, the Assignee is to have the same Remedy for it as the Bankrupt himself might have had; as if it be Money received to Use of Bankrupt, they are to have such Remedy as he might have had for it; and without Doubt the Action well lies here, and even a general *Indeb'* would have done.

Northey, at the Bar: If a Man receives a Thing to my Use, I may say that it was received to my Use, and bring the proper Action in such Case; or, without any such Suggestion, bring Trover.

Holt: *Indebitatus* was brought for Money received upon an usurious Contract, but held it would not lie; and *Keeling* would allow it against Receiver or Factor, but *Hale* would not; by my Consent it shall go as far as it has gone, but not a Step farther. It has been held to lie for a Fine by Custom; but sure that was hard, for it was to leave Matter of Law to a Jury. But *Northey* said, some Strains had been in Favour of Remedy; and he said, that if a Man, pretending Title to my Land, receives my Rent, and gets my Tenants to attorn to him, an *Indeb'* had been maintain'd for the Money; which *Holt* agreed; but said, that had been very hard too.

One summoned before a Judge, to shew Cause why common Bail should not be taken, did not come; whereupon a Day was given for him to come, or else that common Bail should be; he comes before the Day, and consents to common Bail, which was accordingly filed; and at the Day came to make Oath of a Debt above 10*l.* But *per Cur'*, ought not to be received, Bail being regularly filed.

In the Case of the Information against the Town of *Hartford*, after it was filed, at another Day the Court was moved to stop it, if there were not Security for Costs according to the late Act of Parliament. *Holt*: I doubt me you are too late after the Information filed, especially by Motion, but perhaps you may plead it. Information filed, tho' no Security for Payment of Costs, shall not be stopp'd.

Per Holt, at *Nisi prius*: If a Ship be insured under Captain *J. S.* the Part-owners may change the Captain without Notice to Insurers. *Quere tamen*, for it might be, the Confidence and Knowledge of the Captain might be an Encouragement to the Insurers. Captain of a Ship insured may be changed without Notice to Insurers.

Anonymus.

THE Solicitor General moved for Leave to enter a *Non prof.* upon an Information, in order to file another; and Sir *Sam. Aftree*, the Master of the Crown-Office, said, the Course was to come to him, and pay Costs upon the Information, and then to enter a *Non prof.* And *per Cur'*, you shall not file a second before the first be discharged. A second Information not to be filed till first be discharged.

— and *Deer.*

A Prohibition was moved for to the Consistory Court of *Landaff*, where Libel was for fraudulently taking away a Will that was proved with them there, in order to cheat Legatees. *Gould*: Here is a Will properly lodged, and if any fraudulently takes it away, what Remedy have they? for an Indictment or Information will not restore them the Will; and Detinue will not lie for them, because they have no Interest in it. *Turton accord'*. *Holt contra*; The Probate is Authority enough for them to go on, tho' the Will be lost; and the Offence need not go unpunished, for they may have Indictment or Information; and this is not like Cases of Beating in Church-yard, where Statute gives them Power, tho' it be punishable at Common Law; nor Beating in the Church it self, where they proceed *pro reformatione morum* only; and no Prohibition went. Libel for fraudulently taking away a Will which had been proved.

Oldham verſus Rightſon.

Mortuary may
be ſued for
in Spiritual
Court, if Cu-
ſtom be not
denied.

A Mortuary was ſued for in the Spiritual Court of *Cheſter*, and Prohibition was moved for, upon Suggestion, that there was no Cuſtom to pay Mortuary in that Pariſh; and it was agreed, they may ſue for Mortuaries in Spiritual Court, if it be admitted there is any due; but the Statute of *Circumſpecte agatis* makes no more Proviſion for Mortuaries than it does for Tithes, or a *Modus* of them; and in a Suit for a *Modus* the Cuſtom may be traversed. *Hob.* 247. If in Suit for a *Modus*, the *Modus* be admitted, they ſhall proceed; *ſecus* not. 3 *Cr.* 151. 2 *Cr.* 257. and 1 *W. & M. Brown v. White*; it was a controverted Point, but then it was a more difficult Point to obtain a Prohibition, than it is now that Statute give Coſts; and then Court would not grant a Prohibition, without Oath of the Truth of the Suggestion. *Vide* 2 *Keb.* 835, 867. where it is admitted they may ſue for a Mortuary, unleſs the Cuſtom be denied. And Court was for granting the Prohibition, it being a doubtful Point, to have it ſettled; and that the Being of Coſts ſeemed to be a notable Ingredient in the Caſe; and the Statute of 31 *H.* 8. provides they ſhall demand no more than they had by Cuſtom; which tho' it be reſtrictive of their Jurisdiction, yet ſhews they have Jurisdiction of Mortuary.

But the other Side offering *Affidavits* of uninterrupted Uſage, *Holt* ſaid, that might be ſomething; for tho' there were a good Suggestion made, yet, if it appeared to them to be meerly for Delay, they would not grant a Prohibition; and that was the Reason of the Rule of requiring *Affidavit* of the Truth of Suggestion.

Affidavits.

By Courſe of the Court, after *Affidavits* are filed on both Sides, and Day given for the Hearing of Counſel, there ſhall be no new ones read, but ſuch as are affirming the old ones; which ought to contain no new Matter.

*London Cu-
ſtom.*

Per Holt: An Officer in *London* may take away ſome Parcel of Party's Goods to compel an Appearance; but it muſt be a reaſonable Parcel; and upon Attachment of Goods there, the Cuſtom is to leave them in the Party's Hands till the Matter be determined.

Hamley versus Hendon.

Covenant upon a Deed of Demise by Plaintiff's Testator to Defendant of several Parcels of Land, reserving Rent and Suit of Court; in which Lessee covenanted to grind all his Corn and Grains that he should spend in Domestic Use, at the Mill of Lessor's Manor; and Breach assigned, that there were 500 Barrels of Wheat ground and used in Defendant's House which he did not grind at the said Mill, or any Part of them; and to this a Demurrer.

Obj. 1st, This Covenant, by Operation of Law, extends only to such Corn as should grow upon the Premises, and it is not averred to be so; and for this was quoted 1 *Sid.* 374.

But *per Cur'*, the Covenant is express and general of all his Corn, which he should grind for the Use of his House, and nothing appears to restrain it against the Words. But upon another Exception, *viz.* that it was not averr'd, that the Corn was his at the Time of the Grinding, and it might be another's at Time of Grinding, and after bought by Defendant, and so not within the Covenant; the Meaning and Words whereof were, that he should grind all *his* Corn which he should use in his House at the Plaintiff's Mill; for the Defendant might have a Mill of his own, and grind another's Corn there, and after buy it for his House. Judgment was *pro Def'*.

Blank versus Newcomb.

Libel was in Spiritual Court for not paying a Parish-Rate for Repairs of the Church; and suggested for a Prohibition, that all Parish-Rates were to be by Majority of Parishioners; and that every Rate, after it is collected, becomes void; and that this was not by a Majority, &c. and that the Suit was to pay this in Pursuance of an old Rate collected many Years before.

As to the first it is urged, its not being by Majority of Parishioners was a Matter only proper for an Appeal, and so is the Inequality of the Rate. 2 *Bulst.* 289.

As to the second, that this present Rate had indeed Reference to a former one which had been collected, but that was not to give any Force or Efficacy to the former, but only

Rate.
Spiritual Court
cannot make a
Rate, but ex-
communicate
for not ma-
king one.

only by Way of Direction of the later, according to Sir Rob. Lev's Case.

Holt: The right Course is for Spiritual Court to give sufficient Notice to the Parish to meet, and make a Rate for Reparation of Church, which if they do not do, they may be excommunicated; but Ecclesiastical Court cannot make a Rate, or appoint Commissioners to do it; and here the Suggestion recites an antient Rate, which, they say, was to be a standing Order for all Times to come; and that they have confirm'd that Rate; and that the Libel is for Want of a new Payment according to it. *Vide Noy* 131, 126. in Point, for a Prohibition in this Case; and all that Spiritual Court can do is to make an Order that the Church be repaired, but not to assess a *Quantum*: And tho' in Spiritual Court one omits in the Libel that which does against him, as here, that the Rate was made by Commissioners of Ecclesiastical Court, yet they of the other Side may suggest it; and here Prohibition was granted.

Suit may be against a Man both as Heir and Executor. 2 Bro. 97.

Holt: One may be sued as Executor and as Heir both; for why may not a Man make Use of both his Securities.

King versus Speed.

Salk. 399. On Conviction of Deer-stealing affirmed in B. R. Process of *Levari* may go to the Sheriff.

A Conviction for Deer stealing against him being removed up by *Certiorari*, and confirmed here, a *Levari facias* issued out to levy the Money; and *Eyres* moved to supersede that Process, as irregular; 1st, Because this is made a particular Offence, and punishable in a precise Manner, and strictly according to Words of Statute, being against *Magna Charta*; and therefore not to have the Aid of the Process of this Court to levy the Money, no more than they shall have the Help of Indictment or Information originally. 2^{dly}, If this Course shall hold, the Act will be more penal than was designed; for thus his Goods in any County in *England* may be liable, whereas the Statute only subjects his Goods in the County where the Offence is committed; for if there be none in the County where this Process is directed, and that be return'd, a *Testat'* may be, and thereupon a *Levari* into any other County, &c. 3^{dly}, 'The Statute directs the Money shall be levied by Warrant, which is not pursued. 4^{thly}, 'The Prosecutor himself may remove the Conviction, and intitle himself to this Process; and for ought appears to the Court it was so here. *Vide Hutt.* 117, 118. 5^{thly}, At this

this Rate the Offender may be doubly punished; for suppose Sheriff levies 20*l.* still Party shall be liable to a Year's Imprisonment, and Pillory besides; for Statute ordains it so in Case of Failure of Distress to the Value of 30*l.* which Inconveniency would not insue in case of Process to Constable; for Constable, in case of Failure of Distress to full Value, shall not sell the Goods, as Sheriff must; so Party, after he has undergone the Punishment of Imprisonment, &c. shall have his Goods again; and he quoted a Case in *Mich. 23 Car. 2. 2 Keb.* — and *Felton. Per Cur'*: If any Process may be awarded out of this Court, it must be a Distress; the Words of the Statute directing it to be by Way of Distress of the Goods of the Offender, without saying, (*Distress and Sale of Goods*;) and in such Case Officer shall not sell; for where an Act has a known Term in Law, it shall be interpreted according to the Law's Acceptation of such Term; and Distress for Rent at Common Law was not to be sold, but to remain in Nature of a Pledge; and so here it ought only to be, in order to enforce a Payment. *Dy. 280.* in case of Return irrepleviable, Avowant shall not sell. *4 H. 6. 17. 1 Rol. Ab. 887.* If Debt be recovered in Court-Baron, they can only distrain, but not sell, but only detain it till Payment: And it is made a Doubt, if *Certiorari* be of a Judgment in an Inferior Court of Record, if this Court shall award Execution. *1 Keb. 733.* If Distress be given by a penal Statute, it shall not be sold; and therefore it is that some Statutes do expressly put in the Words *Distress and Sale of Goods*; and that the Statute of 43 *El.* hath those Words. *Allen 92.* That Commissioners of Sewers may sell, tho' there be no such Words, but the Statute has Words tantamount; for it is, that the Amerciament shall be levied, and Party punished according to *their Discretion*; and besides that, they may proceed according to the *Custom of Runney-Marsh*, by which the Distress may be sold; and here they are not without Remedy, for Court may send their *Mandate* to a Justice of Peace to issue Warrant for levying by Distress.

Holt: Where one entitles himself to a Duty and Remedy ^{1 Jo. 421.} by Prescription, he must set out his Remedy wholly; indeed ^{1 Cr. 497.} if you prescribe to a Duty, you may have Debt for it without Prescription, but you cannot distrain without it; and if you prescribe to Duty and Distress, you cannot by Virtue thereof sell, without a Prescription for selling too, because a Prescription may be to distrain without selling.

But by your Argument, Mr. *Eyres*, the *Certiorari* would defeat the whole Proceeding and Conviction; for tho' Conviction be confirm'd, you would have it that the Justices cannot give a Warrant, tho' Record being here; and if we cannot award Execution, there is an End of the Matter; But by necessary Consequence of Law, whensoever there is a particular Jurisdiction erected, an Appeal lies from it to this Court; if there be no Judgment below, there will be no need of a *Certiorari* in this Case; and if there be one, then shall one go: And we, you say, cannot award Execution; sure that would make a Failure of Justice; and we have a Power to confirm, as well as to reverse or quash; and if so, by necessary Consequence we have a Power to award Execution of what we confirm; for below nothing can be done, because Record is here. And to say, that at this Rate the Money may be levied in another County, that is not the Case before us; for here the Process is into the County where Fact was committed; so you come too soon for that Objection; but if *nulla bona* had been return'd, and a *Testatum* had issued, there then had been some Colour for your Objection.

Nota hoc.

And when a Statute says Money shall be levied by Distress, this is an Execution, *Rast. Entr.* 175. Levied by Distress, is a special Plea, and so is *Nil debet*. If a Man has Rent due to him, he has his Election to bring Debt, or to distrain; and if he brings Debt after distraining, the Defendant may plead Levied *per Distress*, for by distraining he has determined his Election for that Time; for otherwise he might have two Judgments, viz. *Return irreplevisable*, and Judgment in Debt; to avoid which he may in that Case plead Levied by Distress: But Q. if he had distrained, and Cattle died in Pound, *per moy*.

Vide 8 Co. 41. b.

But Distress in a Leet of common Right may be sold, because it is a Court of Record; otherwise of Distresses in Courts that are not of Record: As to Commissioners of Sewers, that is a special Power given them, and in Consequence of that they may sell. And *Gallice* takes great Pains to prove they are a Court of Record; and tho' some Acts, that order Things to be levied by Distress, have also the Words (*and Sale*,) yet no necessary Inference can be made from that, for Statutes very often express Matters more plainly than they need for greater Caution: *Et per Cur'*, here the Process is regular, and Goods may be sold.

Note further; *per totam Cur'*, if all the Sum were levied to a small Matter, yet the Party for Default thereof shall

undergo the corporal Punishment too, viz. the Pillory, and Year's Imprisonment.

Vills of Shandrigamy and Sholedam.

PER Holt: Commission of Sewers to defend the Kingdom against the Sea is very ancient, and even by special Commission of Sewers. Prescription in some Cases; but Sewers for Melioration of Land are by Act of Parliament.

Holt: (*By*) and (*From*) are synonymous Words.

Trespass.

Holt: Trespass may be joint or several, as Plaintiff pleases; tho' the Fault be the same in respect to him; but is several as to the Agents, because the Act of one is not the Act of the other.

Indictment
quash'd.

Ward moved to quash an Indictment against *A.* for that *asseruit Magistratos Civitat' de Lickfield fore Societatem asinorum.* 1st Exception, That it was *Magistratos*, there being no such Word. 2^{dly}, That it was not a direct Allegation that they actually were Asses, but by a *Fore*: And Holt said if they had not Reputation enough to secure themselves from such an Asperision, he would be of Defendant's Opinion too; and it was quash'd.

King versus Thomson.

Trial at Bar
may be for a
Robbery.

THE Defendant being of good Reputation, and riding in the King's Guards, he was taken by Hundred for a Robbery, on the fortieth Day; and it being feared he should be too violently prosecuted, that the Hundred might discharge themselves by his Conviction, a Trial at Bar was moved for: And *per Holt*; it has been used to grant Trials at Bar in like Cases; but there being no Bill found, he said they could make no Rule; but if there had been a Bill, he said then it might be removed by *Certiorari*, &c. And he said there was one way to sue a Special Commission to find a Bill, and even so there must be Process, and fifteen Days between its Teste and Return, and Return to be on common Day; and he said he knew one Holt an Attorney, who had narrowly escaped being hang'd at Cambridge Assizes, because he was like one Ambrose Holland a Highway-Man.

Vide the Case
in 1 Vent.

King

King versus Town of Andover.

Mandamus
cannot be
joint.
Post Pasch.
12 W. 3.
Butler v.
Rews.

FIVE of the Members of the Corporation being turn'd out sued a joint *Mandamus*; and after had it quash'd upon their own Motion, because they could not join, for that the Wrong done to the one is no Wrong to the other: *Per Curiam.*

Mason versus Keeling.

Case for keep-
ing a Dog
valde ferocem,
&c. who bit;
ill, not saying
sciens.

CASE; in which Plaintiff declared, that on twentieth of June, eleventh of the King, the Defendant *quendam Canem Molossum valde ferocem* did keep, and did let him go loose unmuzzled *per publica Compita*; so that *pro defectu Cura* of the Defendant, the Plaintiff was bit and worried by the said Dog, as he was peaceably going about his Business in such a Street: And another Count was, in which it was laid, that Defendant knew the Dog *ad mordend' assuet'*. To the first Count a Demurrer, and to the second Not guilty.

And it was strongly insisted, that the laying it to be *Canem valde ferocem*, and suffer'd to go about the Streets unmuzzled, and *pro defectu cura*, supplied the want of *Sciens*, &c. for it was said to be Part of the Excellency of the Law of *England*, that it leaves no Man without a Remedy, that has suffer'd a Wrong through Fault of another: But it was agreed there were *damna absque Injuria*, but that only was when it happens without the Commission or Omission of any, but never when there is Neglect in another, through which I am damnified. *And the Rule of Actus non est reus nisi mens sit rea, holds only in capital Offences*; and therefore if Infant or Lunatick commit a 'Trespas, they shall answer it in Damages, and yet it cannot be said to be *Scienter*. *Hale's Pl. Cor. 53.* If one keeps a Beast used to strike, and it kills a Man, it is holden by some to be even Felony, but by others to be only a great Misdemeanor; and the Neglect without Knowledge, where Damages ensue, subjects Party to Action. *Vide Hob. 134.* A Soldier at his Exercise discharging his Gun hurts another, tho' pleaded to be *involuntarie et per infortunium*, yet Action lay; and the Rule in *C. J. Jones 205.* is, that nothing but an unavoidable Necessity shall excuse from repairing an Injury to a third Person through his Default; and here was no Necessity for Defendant's keeping

Dalt. c. 93.

Canem

Canem valde ferocem, much less to let him go unmuzzled about the Streets; and it is laid in the Declaration, and confessed by the Demurrer, to be *pro defectu debitæ curæ* of Defendant, and that it was *valde ferox*; and this Opportunity is given by Defendant to such Creature to do Mischief; what then can there be more reasonable, than to repair the Wrong? There is no Default in Plaintiff, for he was going about his lawful Occasion; and there is sure a great Fault in Defendant to let such a fierce Creature range the Street of London unmuzzled.

Nothing is more probable, than that such a Dog as this let loose among a Crowd of People will do Mischief; and it would be needless to give Notice of its being likely to do so, and like telling a Man that Fire would burn, or a Tigre would do Mischief; and this within the same Reason with Action for negligent keeping his Fire, for that is *pro def. debit' Custod'* of Fire, and this *pro def. debit' curæ* of his Dog; and the Case of Fire is much a harder one, for there is none but must trust his Servant with Fire, and the Accidents are many. 1 Vent. 295. Notice is taken of a Case which happen'd before that Time, and was this: A Butcher did let loose an Ox, and laid, that for want of due penning of his Ox Plaintiff was hurt by it, and there Action lay *for want of due penning of his Ox*; and this is for want of due Care of his Dog; and here is equal Prospect of Mischief in both Cases. If a Man has an unruly Horse, which breaks through his Close or Stable and does Mischief, Action will lie for it; and it is hard one should have Remedy for the least Trespass done in his Land, and none for Trespass done thus to his Person by wounding or maiming.

Suppose one keeps several Mastives, shall he be exempt from Action for Mischief done by every one of them, till he knows that he has done a prior Mischief, that is, no Care is to be taken to prevent the first Mischief; this seems to be contrary to the Policy of the Law, which delights more in preventing than punishing; and the Maxim is, *præstat cautela quam medela*.

Obj. If an Action be countenanced upon this Declaration, a Lap-Dog or Spaniel shall not snap at a Man, but Action shall be straight brought for it; so it will introduce a Multiplicity of Actions, which Law abhors.

Answ. There ought to be *Sciens, &c.* or that which is tantamount, that it was *ferox*, as here, and then no Inconvenience.

Obj. 2. The Precedents are all *Sciens*, &c. *Answ.* That would be an Aggravation of Damages; and Precedents imply only that it would be the surer way so to do, but not that *Sciens* is absolutely necessary.

Obj. 3. It is necessary in Case of Action for biting Sheep, *Ideo a pari. Vide 20 Ed. 4. 11. so per Townsend*; but there it is not denied, but if Dog of *A.* chase the Sheep of *B.* into Soil of *C.* whereby Action is given to *C.* against *B.* that *B.* shall have Action against *A.* And there is no Comparison between the biting of Cattle and biting of a Man, for Law has a greater Regard to the Life and Safety of a Man than of a Beast; and every body is presumed to know that a Dog *valde ferox* will be apt to do Mischief, if let loose in a Street among a Crowd of People.

Obj. 4. It may be punish'd by Indictment; and I believe it may; and from thence I infer this Action will lie by any that has a special Damage, as in 1 *Inst. 56. a.* and it is a true Maxim, *Quod quisque debet ita uti suo, ut alteri non noceat.*

Raymond contra. Some Books say that Law takes Notice of the Nature of a Mastiff, and that is, that he is tame and domestick, or conversant with Man, and therefore Action does not lie for Biting of such a Dog without a *Sciens*; what is it then can distinguish this Case from that? It is said that this was a Mongrel Cur *valde ferox*, and that letting loose in a Highway is a publick Nuisance; and even in that they fail, for they only say that he let him loose *per Compita*, and that does not necessarily signify a Street or Highway; for *Latin* Authors use it for a Court or Yard before a Man's Door; nor do I know of any Authority that it is a Nuisance to let a Dog go at large; and there is a Diversity between an Ox that ranges the Field, far from the Society of Man, and a Dog, which is *Animal Domesticum*, bred among them, and therefore cannot be presumed to be prone to Mischief as the other. And they cannot say that it is the Nature of Dogs to be fierce; and to say that an Averment of its being fierce will support an Action, is to oppose the whole Current of Authorities, which all require *Sciens*; and it might be fierce, and the Owner know nothing of it, for they don't aver he did know him to be fierce.

And as to the Rule of Law, that no Man's Wrong should be left remediless, there are few Rules without Exceptions; and the Cases of *Hob.* and *Jones*, they are not like this, for every body knows that a Gun charg'd, if it goes off, is apt

to

Dyer 25. b.
29. a.

to do Mischief, but not so of a Dog: And an Indictment would not have laid here without a Knowledge of the ill Quality.

Gould, Justice: No doubt but in the Case of Sheep there ought to be a *Sciens*, because that is an accidental Quality, and not in the Nature of a Dog: And as to Property of a Dog, the Books distinguish; for a Man has a Property in a Dog that is a Mastiff or Spaniel, for the one is for the Guard of his House, the other for his Pleasure; but this here is a Mongrel, and laid to be *valde ferocem*, and that must be an *innate Fierceness*, and not accidental; and if Dog be *assuet* to bite Cows, and Master knows it, that will not be sufficient Knowledge to make him liable for his biting Sheep: Besides, this Case is distinguishable in respect of the Place, for Law takes Notice of Highway, and is a Security for Passengers; and it would be dangerous to keep such Dogs near the Highway, where all Sorts of People pass at all Hours; and to maintain this Issue they must give a Natural Fierceness in Evidence.

Holt: If it had been said, that Defendant knew the Dog to be *ferox*, I should think it enough; and the Difference is between Things in which Party has a valuable Property, for he shall answer for all Damages done by them; but of Things in which he has no valuable Property, if they are such as are naturally mischievous in their Kind, he shall answer for Hurt done by them without any Notice; but if they are of a tame Nature, there must be Notice of the ill Quality: And the Law takes Notice, that a Dog is not of fierce Nature, but rather the contrary; and the Presumption is against the Plaintiff; for can it be imagin'd a Man would keep a fierce Dog in his Family wittingly. If any Beast, in which I have a valuable Property, does Damage in another's Soil in treading his Grass, Trespas will lie for it; but my Dog goes into another Man's Soil, no Action will lie. *Vide Latch, Millan and Hawtree*, that *Scienter* is the Gift of the Action; and so is 1 *Cr.* where it was doubted whether the *Scienter* should go to the Keeping or Quality; nor does it appear here but it was an accidental Fierceness; or suppose it were an innate one to this Dog particularly, and it had been given to the Owner but an Hour before; shall he take Notice of all the Qualities of his Dog at his Peril, or shall he have his Action against the Giver for bestowing him a naughty Dog.

In Case where a Dog bites Pigs, which almost all Dogs do, *Scienter* is necessary. 1 *Cro.* 255. And I don't doubt but if it be generally laid, that Dog was used to bite *Animalia*, and

Owner to answer for all Damage done by Creatures in which he has a valuable Property. Of Things in which he has not, if they are naturally mischievous, to be answerable without Notice; but if are of a tame Nature, must have Notice of the ill Quality of them.

and Defendant knew of it, 'twill be enough to charge him for biting of Sheep, &c. and by *Animalia* shall not be intended Frogs or Mice, but such in which Plaintiff has Property. And *Jud' pro Def. per Holt and Turton, Gould mutante opinionem suam.*

— and Crouch.

Motion.

HALL moved to have him discharged upon the late Act of Parliament for disbanding the Army, whereby Soldiers are exempted from Suits for three Years upon Affidavits. *Holt*: All we can do is to order common Bail, but he must discharge himself of the Action by pleading the Act, &c. and Plaintiff may traverse his Allegations; and so was the Rule.

Per Cur': If Order be by two Justices, and so said, their Names need not be mention'd; and the next Quarter-Sessions, to which the Appeal must be, is the next after Party is grieved.

Ante p. 258.
Gaming.

Per Holt: If one lose 100 l. to one, and after 100 l. to another at one Sitting, both Debts are lawful, notwithstanding the Statute. So if a Man lose 500 l. ready Money, and 100 l. upon Tick, both are good. And if there be two Sharpers, and one of them gets 100 l. and gives over, and then another takes him up who wins another 100 l. both are good; for as they were sharpers, he was a Rake, and ought to learn Wit by being bit; and they are distinct Facts.

Ante p. 258.
acc'.

But *Note*; I have heard *Treby*, C. J. of Common Pleas, deliver a quite contrary Opinion in Case where two win successively; because at that Rate the Statute, which ought to receive a favourable *Interpretation in Suppression of Vice* and Gaming, would be easily evaded.

Custom of
Dartmouth.

Per Holt: The Custom of the Town of *Dartmouth* is, that if one serves his Time, and learns a Trade there, he is not thereby free; but Corporation have Power to make whom they please free. It is an extraordinary Custom, but who can help it.

New Trial.

Holt: In granting a new Trial we ought not altogether to rely on the Certificate of the Judge who tried the Cause, but upon the Reason of the Thing; and sometimes I would grant a new Trial against Certificate of a Judge, if in my Judgment and Conscience Matter deserves a Re-examination.

Holt: I never liked the Exception of *pro com* in Outlawry, ^{Outlawry} tho' it has been one before I was born; but sure the first that obtained it had good Luck.

King versus Warden of the Fleet.

f. l. as it seems in l. 1. 609. & 690. by the name of Reg. v. W. 1. 1. 1.
AT a Trial at Bar of Issues join'd, in Pleading on a Challenge. ^{Challenge.}
monstrans de droit in Chancery, to an Inquisition re- ^{Array chal-}
 turn'd there, finding several Misdemeanors in the Warden in ^{lenged, for}
 Duty of his Office, which Office is found to be an ancient Office ^{that the Jury}
 exerciseable in *Middlesex*; whereby the said Office, and the ^{should have}
 Prison-House in *London*, which were found to be appendant ^{come from a}
 to the Office, were forfeited: There were two Issues, one ^{different}
 upon the Escapes, the other upon the Appendancy in *London*; ^{County; no}
 and a Jury of *Middlesex* being come to Bar, the Counsel of ^{good Cause.}
 the Defendant challenged the Array, and had it drawn up in
 Parchment in *French*, and read by Counsel; the Cause was,
 that the Jury ought to come from *London*, where the House
 was, and not from *Middlesex*, and return'd by *London* Sher-
 riff, and not a *Middlesex* Sheriff; and he concluded *et hoc*
parat' est verificare prout cur', &c. et petit inde judicium per
quod arraiam. cassetur.

It was insisted on, the Inquisition was in the Nature of an Information, Declaration or Indictment; and took Notice that the House of Prison was in *London*, and that suppose the Office be in *Middlesex*, yet that only made it like a Common in one County appendant to Manor in another, in which Case both Counties ought to join; and if it be a good Challenge to a Jury, that they are not indifferent, tho' of legal Venue; *a fortiori*, when they have no legal Capacity at all; 3 *Cro.* 646. was quoted, where Cattle distrained in one County, and drove into another, and adjudged, that the Jury to try that Fact should come from both Counties: And tho' in Truth *London* cannot join with another County, yet that ought to be suggested on the Roll, and Court cannot otherwise take Notice of it; besides, if the *Ven'* be awarded into both the Counties, and *London* Jury came to the Bar, and did not insist upon the Privilege, the Trial would be regular; but if they insist upon their Privilege, then perhaps Court for Necessity may award a *Ven. Fa.* to *Middlesex* only.

And it is no Reason to say, that because we may have Advantage of this in Arrest of Judgment, we may not offer it

now; for tho' we wave what we may move in Arrest of Judgment, yet we may assign it after for Error in a Writ of Error.

Attorney General *contra*: The Cause of Challenge to the Array, is the want of Indifference in the Officer; and the Reason why they may challenge the Panel is, because that Cause doth not appear on Record, and therefore they have no other way to take Advantage of it, and that too is the Reason of Challenge to Polls.

Want of proper Venue no good Cause of challenging Array. But being a-kin, interested, or not qualified, is.

Demurrer on Challenge. Motion might be to quash *Venire*.

A Prisoner, who had given Bond to be a true Prisoner, admitted Witness to prove that he was suffered voluntarily to escape.

Holt: The Matter of Challenge ought not to be to the Court, as here you make it; for you say we have awarded a Writ to a wrong Officer, for the Array is rightly made according to the Writ. If Panel were returned by a Sheriff, being a Party concern'd, or being a Member of a Body Politick concern'd, it would be a good Cause of Challenge; but we don't take Notice upon the awarding the *Ven. Fa.* of any such Thing, if we are not apprised of it by Suggestion of Party; and want of proper Venue was never yet a Challenge to the Array; if he were a kin to either Party, or interested, or not qualified by Law to make a Return, or had made it at the Request of either Party; or if the Cause did concern the Corporation of *London*, the *Ven.* ought to go to the Coroner at first; *but if you insist upon it, you must demur for the King, and they join in Demurrer; then all appearing us on Record, we may give Judgment immediately, or take Time to consider; and Demurrer was ordered to be drawn instantly, and a Joinder in Demurrer and Challenge overruled.* And *Holt* said, it had been proper for them to move to quash the *Ven. Fac.* before; but now the Jury was at the Bar.

To prove the Escape here, a Witness, who really had been a Prisoner, and voluntarily suffered to escape, was produced.

To whose being a Witness it was objected, that he had given a Bond for his being a true Prisoner, which he had forfeited by escaping; and besides he had been retaken. Now by his Evidence he would make this a Bond of Ease and Favour, and the retaking a false Imprisonment; for if the Defendant be convicted upon his Evidence, and after Debt be brought by him on the Bond, the Conviction will be Evidence to make it void, as taken for Ease and Favour: And in an Action of false Imprisonment for retaking, the Conviction will be likewise Evidence: And it was compared to an Information for usurious Contract, even in the King's Name, the Party to the Contract shall not be a Witness, if the Debt be not paid.

So in Information of Perjury, neither Party, whose Title was supported or invalidated by the Oath, is a Witness; Vide Hard 331. for if there naturally do follow from his Evidence, if believed, any consequential Advantage to himself, he is no Witness; and the Cases of *The King* and *Tipping*, and *King* and *Hobby*, were quoted in the Case of the Perjury.

It was answered and resolved by the Court, 1st, That if this were a Bond for true Imprisonment, it would be good; but if for Ease and Favour, void, and an Escape. 2^{dly}, That a Conviction here could be no Evidence against the Warden, upon Debt on the Bond, nor for the Prisoner in false Imprisonment against the Warden; because it would not be between the same Parties; for Conviction at Suit of King for Battery, &c. cannot be given in Evidence in an Action of Trespass for the same Battery, nor *vice versa*; the like Law of an usurious Contract. 3^{dly}, That no Record of Conviction or Verdict can be given in Evidence, but such where of the Benefit may be mutual, *viz.* where the Defendant as well as Plaintiff might have made Use of it, bring it into Court, and give it in Evidence, in case it did for him. So if the Record had been for the Plaintiff's Advantage, and that they could not give it in Evidence, the Defendant should not give it in Evidence for that very Reason: And this was resolved at another Trial at Bar before this Term, between *Sherwin* and Sir *Walter Clarges*, where a Verdict between the Earls of *Bath* and *Mountague*, upon the very same Point and Title now in Question, *viz.* the Legitimacy of *Christopher Duke of Albemarle*, was denied for Evidence; and *per Holt & Cur'*; Suppose here had been no Bond or Re-taking in this Case, he would be a good Witness, for Postea 343. he would be subject to be re-taken by his Plaintiff, and then his Swearing would not avail him; for since he is liable to be re-taken, no Matter to him at whose Suit it is: Then there is no Objection against him but the Bond; and sure the Bond, being a distinct and collateral Matter to the Escape, shall not hinder being a Witness; and it is not like the Case of an usurious Contract, for there the very Bond is Part of the Crime, and no distinct Act from it; and the Party's coming to prove it is a Discredit to the Bond, it being Part of the Crime. And as to the Case of *Tipping*, they would have one, whose Title depended on the Perjury, be a Witness, when the Conviction would make an End of the Title; but all this is where *the Thing is Part of the Crime*. And another Case was in an Action on Agreement Vide Hard. 331, 332.

3^d ante 312.
Conviction of Battery at the Suit of the King cannot be given in Evidence in Trespass on the same Battery.

No Record of Conviction or Verdict can be given in Evidence, but such as both Parties might have produced.

Postea 343.

1 Vent. 51.

On usurious Contract, the Bond is Part of the Crime, and Party not to prove it.

Vide Hard. 331, 332.

in

Witness out of
Necessity, as
on Statute of
Hue and Cry.
Person pre-
judiced by a
Will admitted
to prove it
forged.

So 1 Ven.
243. Brown's
Case.
Postea Pasch.
13 W. 3. Po-
cock v. Thor-
nicroft.

Ante p. 72.
If Disability
be by Act of
Parliament,
and Part of
the Judgment,
the King can-
not pardon it;
but if it be
only conse-
quential, he
may.

in Writing in Common Pleas, and Verdict for Plaintiff, and 100*l.* Damages, in Common Pleas; and an Information brought for the Forgery; now the Defendant below was denied to be a Witness to convict him. Another Reason was added from the Nature of the Thing, which being a secret Transaction, if any of the Parties concerned be not, for the Necessity of the Thing, admitted for Evidence, it will be impossible to detect the Practice; as in Cases upon the Statute of Hue and Cry, the Party robbed shall be a Witness to charge the Hundred. And the Case of *Cook* and *Watts* in the Exchequer, where one, who had been prejudiced by the Will, was admitted Evidence to prove it forg'd. And the Case of *King* and *Paris*, said to be well reported in 1 *Sid.* 431. *The King v. Paris*; Feme Covert was received as a Witness, to convict one upon an Information, for a Practice in Drawing her in, when Sole, to give Warrant of Attorney for confessing a Judgment upon an unlawful Consideration, whereby Execution was sued against Husband; and *Holt* said, that tho' a Feme Covert could not by Law be a Witness for or against her Husband; yet in my Lord *Audley's* Case, it being a Rape upon her Person, she was received to give Evidence against him. And the Court concurred with him, because it was the best the Thing could bear; and a Verdict here could not be given in Evidence against the Bond.

But *Holt* denied what was urged, that at Common Law the Party, whose Deed was forged, or to whose Prejudice the Perjury was, could be a Witness; and that the Statute had made any Alteration.

Another Exception to the same Person's Evidence was, that he had been convicted of common Barretry, and a Record of his Conviction was produced, and that he had been fined 100*l.* And *Holt* said, if he had had the Handling of him, he had not escaped the Pillory; and that he remember'd Serjeant *Maynard* used to say, it were better for the Country to be rid of one Barretor than of twenty Highwaymen. But in Answer to the Exception was read the late Statute of 6 & 7 *W. & M.* which pardoned all the King could pardon. And Court held that Pardon made him a legal Witness; and that even the King's Pardon by Charter would make him a legal Witness, tho' such a one as they could not incourage a Jury to believe. And this Diversity was taken by them, viz. that if the *Disability be by Act of Parliament, and Part of the Judgment*, that the King cannot pardon it; but if the Disability be only consequential, the

the King may pardon it. But the Defendant's Counsel not being satisfied with the Resolution of the Court upon the first Exception, prayed to have a Bill of Exceptions; whereupon *Holt* directed them to draw up their Exceptions, for the Statute says, *Scribantur Exceptiones*.

And it was agreed, that Consent of Party, at whose Suit the Commitment was, to the Escape, is good Evidence for Defendant. And *Holt* said, if there be an Executor in Trust, and *Cestuy que Trust* agree to the Enlargement of the Prisoner, that is Evidence of the Consent of the Executor, but not conclusive Evidence. Ante p. 323.

Another Question was, whether one who had been Attorney for Defendant should be compelled to be a Witness; and *Darnell* said, this being a criminal Matter, he should; but not so in a civil Matter. But *Pratt* said, that if he be sworn, we must ask him his whole Knowledge, and perhaps he cannot discover that without charging himself; for if one's Declaration generally may be made Use of against him, *a fortiori* what he says upon Oath shall; and this seem'd to weigh with the Court. But *Holt* said, he was of Opinion against his Brothers some Years before, in the Case of one *Holford*, that any Thing an Attorney knew, otherwise than *quatenus* an Attorney, he ought to declare. But his Brothers held, an Attorney ought not upon any Account to be received to reveal his Clients Secrets; and *Holt* said, if a Client bring a forged Deed to Counsel, the Counsel ought to prosecute him; and that he had known such a Thing done. Attorney can not be a Witness in a Cause where he had been concerned.

Holt, upon Occasion of a Witness that was burnt in the Hand, said, that one might be burnt in the Hand twice; as suppose the Record of the first Conviction be mislaid, and so not produced. Nota; It was Captain Cusack's Case.

Note. Per Holt: The King may have a Prison in another Man's House.

And in Respect to Person that had been burnt in the Hand, if it were for Manlaughter, and after pardoned, it were no Objection to his Credit; for it was an Accident which did not denote an ill Habit of Mind; but focus if it were for Stealing, for that would be a great Objection to his Credit, even after Pardon; but the Record of Conviction ought to be produced, which here they had not. Burning in the Hand does not impeach his Credit, unless it be for a Crime that affects it. Ante p. 72.

At last the Counsel for the Defendant insisted on this, that the House of the *Fleet* was not appendant to the Office, as the House of the Rolls is to the Office of Master of the Rolls. 1st, Because they pass by two distinct Grants. 2^{dly}, That,

That, if ever it was appendant, it was made disappendant by Letters Patent in King *Ch. 2.*'s Time, whereby *Caroon* House in *Surrey* was given to the Warden, and Licence to sell the *Fleet* House. But it was answered and resolved, *1st*, that there was the constant Reputation of its having been appendant once, and that Reputation continues still. *2dly*, That the Granting a New House to the Warden, might indeed make that House appendant to the Office, but not disannex any; and lastly, that the Licence to sell the House did work nothing till Execution, which they had not shewed; and both Issues were found against the Defendant.

At Nisi prius coram Holt.

Anonymus.

Indictment for
a Nuisance in
keeping Gun-
powder.

ONE was indicted for a Nuisance, for keeping several Barrels of Gun-powder in a House in *Brentford* Town, sometimes two Days, sometimes a Week, till he could conveniently send them to *London*; wherein *Holt* resolved, *1st*, That to support this Indictment, there must be apparent Danger, or Mischief already done. *2dly*, Tho' it had been done for fifty or sixty Years, yet if it be a Nuisance, Time will not make it lawful. *3dly*, If, at the Time of Setting up this House in which the Gun-powder is kept, there had been no Houses near enough to be prejudiced by it, but some were built since, it would be at Peril of Builder. *4thly*, Tho' Gun-powder be a necessary Thing, and for Defence of the Kingdom, yet if it be kept in such a Place, as it is dangerous to the Inhabitants, or Passengers, it will be a Nuisance.

Anonymus.

On Legacy
charged on
Land, Probate
of the Will
given in Evi-
dence; posi-
tive Proof of
two Witnesses,
and circum-
stantial Proof
of the Death
of the third,
admitted after
fifteen Years.

A Man devised a Legacy out of his Land, and died, leaving sufficient Assets for the Payment of all his Debts and Legacies. *Per Holt*: That Legacy ought to be paid out of the Land; for it is a Charge on the Land, and not on Goods. Tho' *Cowper* King's Counsel said, that in Chancery, if it be not expressed that Legacy should be paid out of Land, and not out of Goods, if there be sufficient Assets, they will charge them in Ease of Inheritance; to which *Holt* answered, if Chancery be meddling with Wills, they ought to go according to Law; and in this Case a Probate

of the Will was given in Evidence, it being of fifteen Years standing, and the Witnesses being three, and dead; positive Proof was made of the Death of two of them, and circumstantial Proof of that of the third.

In Chancery.

IT was agreed by Court and Bar, that Course of Court is, before any Bill of Review is granted, the former Decree ought to be executed, if the Cause of the Bill of Review, be not such as extinguishes the whole Right and Foundation of the Decree, as a Release; and that it is a good Plea in Bar of a Bill of Review, that the former Decree is not executed; and it was said, that tho' Bills of Review be in Nature of a Writ of Error, yet it is not favoured in Equity; for upon Writ of Error, (and that only in some particular Cases,) one need only give Bail to pay Principal and Costs; but in Bill of Review, the Decree ought to be actually complied with; and besides, there ought to be Security for Costs: But a Case of *Palmer* versus *Denby* was cited, where in the Case of an Executor it was granted, without Execution of Decree.

Before Bill of Review granted the Decree to be executed.

Note; It was also agreed, that if a Parliament-man sue one at Law, he may bring him without Breach of Privilege into Equity, to discover Matter necessary for his Defence at Law. Q.

Privilege.

Sir Walter Clarges versus *Sherwin*.

AT a Trial at Bar, in Ejectment, of Lands in *Yorkshire*, Part of the Duke of *Albemarle's* Estate, wherein the Legitimacy of Duke *Christopher* was the only Question; it was ruled by Court, that a former Verdict between other Parties, concerning other Lands depending upon the same Question and Title, could not be read in Evidence; for if it were in Affirmance of Plaintiff's Title, they could not read it, as being between other Parties; and what would not be Evidence for one shall not be for the other.

What is not Evidence for one, not to be Evidence for the other.
Ante p. 339

But notwithstanding the Verdict was read, to let them in to give Evidence, that a Witness produced by Plaintiff had sworn now directly contrary to what he had sworn at the Trial.

Postea 346.

At

At *Nisi prius* coram Holt.

Pawn-broker,
of him said
*Thou art a
broken Fellow.*

AN ACTION of Slander, in which Plaintiff set out, that he was a Pawn-broker by Trade, and that Defendant said these Words of him, *Thou art a broken Fellow*, and laid and proved Loss of Customers, viz. that some who were coming to pawn Goods with him forbore coming, and others took away theirs by Occasion of the Words.

Vide Keyl.
Cr. Cases 50.
seems cont.

Holt: The Trade of a Broker is an honest lawful Trade, tho' it lies under Suspensions; for it is lawful to buy old Goods and sell them again, and so to lend out Money upon Pledge; but a Broker ought to be very cautious in Buying, for fear of buying stolen Goods; yet if he should buy stolen Goods, not knowing them to be such, it is no Crime.

Vide Stat.
1 Jac. 21.

Search War-
rant.

* 2 Inst. 52.

H. P. C. 46.

And upon Points arising upon this Case, he said, one might take a Warrant to search a suspicious House, *upon a Felony committed*; but it is at his Peril to execute it *in due Time*, and at *suspected Houses only*, and tho' Constable may, by Virtue of such Warrant, search the House, and all other Things that his Warrant does authorise him to do; yet if he goes beyond his Warrant, by which any Body is damaged, he is answerable for it.

Vide Diver-
sity, 1 Sid.
264.
Trover and
Conversion.

Holt: In Trover, Plaintiff ought to prove Property of Goods in him, and at least a Demand and Refusal; and if there be several Parcels, the orderly Way to give Evidence is to make an Inventory of them, and prove the Property of Goods mentioned in it, and Demand and Refusal of them.

The Case was: A Captain contracted with Seamen to go on a Voyage, and after he had got them on Board, he would not pay them according to Agreement; upon which they demanded their Goods, which he refused, if they did not stay till he had searched for them, which he refused to do then, and this held good Evidence of a Conversion.

Property is in
the Person
who pays the
Money; and

Per Holt: Son employed his Father to buy a Frame for him; Father agrees for it in his own Name, and pays Part of the Money down, and gave a Note for the Rest; by the Payment of the Money, and giving the Note, the Property of the Frame was immediately vested in the Father; and tho' the Bill of Sale, which was not made till a Month after, was made to the Son, the Property, which was al-
ready

ready altered and vested in the Father, could not be thereby divested, and lodged in the Son; but if the Bill of Sale had been made to the Son at the Time of Sale, it would have vested the Property in the Son: And an Earnest does not alter the Property, but only binds the Bargain; and Property remains in Vendor till Payment of the Money, or Delivery of the Goods.

Earnest does not alter Property, only binds the Bargain.

An *Indeb' Assump'* upon a Bill of Exchange by *Domingo Franca*; it appeared upon the Declaration, that there were several Indorsements, and the Action was brought by the first Indorser, who struck off the several Indorsements, and brought Action for Non-payment; the Bill did specify Value received of the Plaintiff.

Indebitatus Assumpsit on a Bill of Exchange.

Holt: If the Action had been upon the Custom, in this Case the Way had been, for the Plaintiff to get the last Indorsee to indorse it to him, for him to bring Action as Indorsee: But this Action he said well lay, for the Bill was given as a Security for Money, and without Doubt it was a Debt.

And here Plaintiff, to shew a Protest, produced an Instrument attested by a Notary Publick; and tho' it was insisted on, that he should prove this Instrument, or at least give some Account how he came by it; *Holt* ruled it not to be necessary; for that, he said, would destroy Commerce, and publick Transactions of this Nature. And he said, a Bill of Exchange might be accepted by Parol, tho' the usual Way be to do it by Writing; and that if a Bill be drawn upon two, and one of them accepts it, it is an Acceptance of both.

Protest need no other Proof but Attestation of Notary Publick.

This seems to be in Case of Partners, and Bill drawn by Factor, &c.

Then it was urged, that the Declaration shews a Protest for Want of Payment, when it was in Truth for Want of Acceptance, as appeared by the Protest; yet it was ruled well; because this was not upon the Custom, but a plain Debt; and one might bring Debt or *Indebitatus Assumpsit* upon a Bill of Exchange, because it is in the Nature of a Security.

Original Drawer was offered as an Evidence, in an Action upon a Bill of Exchange, to prove that he did not draw the Bill, was denied, because at last the Burden must fall upon him; but the Party gave him a Release in Court, and that was sufficient.

Drawer of a Bill of Exchange, no Witness to prove he did not draw it.

— and *Harrison*.

Servant, im-
powered to
draw Bills of
Exchange in
his Master's
Name, does
it after out of
Service.

A Servant had Power to draw Bills of Exchange in his Master's Name, and after is turn'd out of the Service. *Holt*: If he draws a Bill in so little Time after, that the World cannot take Notice of his being out of Service; or if he were a long Time out of his Service, but that kept so secret, that the World cannot take Notice of it, the Bill in those Cases shall bind Master.

Witness.

A. and *B.* two Brothers; the Goods of *B.* in his House were taken in Execution; *A.* supposing them to be his Goods, brings Trover; and *B.* and his Wife were denied to be Witnesses to prove them the Goods of *A.* tho' it were to devert the Property out of themselves, because it favoured of Fraud. 2.

Executor tak-
ing a Bond
from a Debt-
or, makes it
Assets.

In Debt, by Husband and Wife against an Executor, who pleaded *Plene administravit*; and upon Issue it was proved, that Executor had discharged a Debtor of the Intestate out of *Ludgate*, taking a Bond from him for the Debt; and it appeared that he was so extream poor that he was downright starving; yet the Debt was judged Assets in Executor's Hands.

Assets pre-
sum'd, if In-
ventory not
given in.

Besides, the Executor had not an Inventory; wherefore it was said they ought to intend Assets.

Wife conti-
nues Suit
commenced
by her and her
Husband,
when reco-
vered shall not
be Assets.

1 Chan. Ca.
189. cont.
1 Chan. Ca.
182.
Prec. in Chan.
63 Ca.
Ante p. 343.
pari ratione.

And here *Holt* ruled, 1st, that if Husband and Wife jointly sue for Debt due to Wife before Marriage, and Husband dies, and Wife continues the Suit, the Money when recovered shall not be Assets to Executor of Husband. And that Husband alone might bring Debt for Portion promised to him with Wife; and tho' Land had been settled by Husband upon Wife in Consideration of her Fortune, of which this Debt was Part, yet he having not recovered it during Coverture, the Wife should recover it to her own Use. And tho' it was pretended that there was a Recovery in Husband's Time, and that they would prove by the Sheriff who had a Writ of Execution; yet they having not the Judgment on which the Execution was, it was ruled they could not give that in Evidence.

Normand and Mills.

FAlse Imprisonment against a Constable for executing a Warrant of Sir *James Butler* after he was out of the Commission of the Peace. *Holt*: Constable at his Peril is to take Notice, that his Warrant be by one in Commission; but all the Favour we can do him is, since it was a Warrant executed a Day or two after Sir *James* was out of the Commission, that if he has behaved himself honestly and civilly, to be mild to him: And he said, the Constable ought to shew the Justice of Peace's Commission, tho' heretofore it were held common Reputation would be enough; and here the Constable, coming out of his own Parish to execute the Warrant, betrays his Officiousness.

D E

Term. Paschæ,

Anno 12 W. III. in B. R.

Coram Holt, Turton, et Gould Just.

PER *Holt*: In a Case between the Earl of *Peterborough* and *Sadler* his Farmer, a Trial being concerning the Value of Improvement made by *Sadler*, a Jury of Farmers having given 200*l.* Damages, which was thought excessive, and therefore a new Trial granted; and a Jury of Gentlemen order'd, who only gave 40*l.* whereupon a new Trial now was moved for, for *Sadler*, because of Smallness of Damages; and *Holt* said that one must

must not always conclude, because the Court grants a new Trial, that they are satisfied that the first Verdict was bad; but it is often because the Thing may require a Re-examination; and a new Trial was granted.

Sir — Cecil and others of the Town of Nottingham.

Whether Attachment may be served on Sunday.

THE Question was, whether Serving an Attachment for Contempt on *Sunday* were within the Statute against *Sabbath* breaking, the Words *that all Arrests on Sunday except for Breach of Peace are void*. *Holt*: Suppose it were a Warrant to take for Forgery, Perjury, &c. shall they not be served on *Sunday*? And shall not any Process at King's Suit be served on *Sunday*? Sure the Lord's Day ought not to be a Sanctuary for Malefactors; and this here partakes of the Nature of Process upon an Indictment; but *Cur' Adv.*

Holt: Upon an Attachment one is only to answer Interrogatories; and if he can swear off the Contempt, he is discharged. And Ignorance of the Law cannot be pleaded in Justification of an Act against Law, but may be offer'd in Mitigation.

Ante p. 164. The Attachment, which intitles the Party to Damages, is on the *Pluries*; that, which punishes the Contempt, is on the *Alias*.

Hawles, Solicitor General, moved for an Attachment upon the *Alias Mandamus*, and *Holt* said it hath been sometimes granted in the like Case, but not frequently. And there were two Sorts of Attachments upon a Mandatory Writ; the one intitles the Party to his Action for Damages, and that must be upon the *Pluries*; *Vide* 1 Cro. 559. and the other punishes the Contempt, which may be on the *Alias*. So is the Attachment upon a Prohibition, which is the Case in *Cro.* and here they took a *Pluries*, and no Attachment.

King versus Bell.

HE was bound by Recognizance to appear here for printing a seditious Libel concerning the *Scots Colony* at *Darien*; and it appearing an Indictment had been found against him at *Old Baily*, which he had travers'd, and was to answer there, his Attendance was discharged here.

Tho' the Plaintiff, after Judgment, does own Satisfaction by Parol, yet we never do compel him to do it by Deed, if Defendant

Defendant does not release Errors; for if the Judgment were after reversed, the Plaintiff would be concluded.

Stout versus Marson & Cowper.

ON the Day, on which an Appeal was returnable, it was moved the Appellant should be demanded. *Cur'*: There is no Writ return'd, so no Appeal pending; and the Sheriff has all this Day, sitting Court, to make a Return; but it was agreed, if the Writ were Returned, they might come and have Appellant demanded, and if he did not come, they should be discharged. And a Motion for Appellant, that Sheriff should return his Writ, was denied, there being no Affidavit that it was delivered to the Sheriff.

Appeal.
On Writ re-
turned, Ap-
pellant may be
demanded,
and on his not
coming Ap-
pellees will be
discharged.

Sprag versus Richardson.

A Rule of Court was for Sheriff to shew Cause, upon his personal Attendance, why he should not pay Money levied on Execution: And upon Affidavit of Service, *Northey* moved for a new Rule absolutely to pay the Money; let Court deal with him as they pleas'd for the Contempt; but Affidavit being defective, they were ordered to mend it.

Butler versus Retts.

ACTION for a false Return to a *Mandamus* was brought by two Church-Wardens, and moved in Arrest of Judgment that it could not be, because the Fees of the one were not the Fees of the other, but several. *Cur' adv'.*

Vide ante
332. *simile.*
Two cannot
join in Action
for false Re-
turn to *Man-*
damus.

King versus Hays.

AN Order of Sessions was for the discharging an Apprentice from his Master upon the Statute of 5 *El.* and two Exceptions taken to it. 1st, That the first Proceeding was at the Quarter-Sessions, whereas it ought to have begun by Complaint to two Justices; and for this *Hawksworth* and *Hillary's* Case in 1 *Saund.* was cited, to which was opposed 1 *Vent.* 174. 2^d Exception, That it appeared the Master was not present. *Holt* was then strongly against the Order upon

Original Or-
der of Sessions
made for Dis-
charge of Ap-
prentice.

the first Exception, for that they ought to have followed the Method set them by the Statute, for Statute thought convenient that Endeavours of Justice of Peace should be first used; and if Party, of whom Complaint was, had not complied with the Justice's Proposal, then that he should give a Bond to appear at Sessions, and that is as it were by Appeal: But if the Party had promised to obey the Justice of Peace's Orders, but after would not stand to them, the only Way was to complain *de novo*, &c. and the Justice to attach him, and bind him to Sessions.

But *Note*; *Trin.* 1701. in the Cases of the King and *Johnson*, and the King and *Fenwick*, it was unanimously resolved the Order made at Sessions at first Step was good; and *Holt* said he was brought to that Resolution rather from the Necessity of the Thing, the Practice being all so, than any Reason he saw for it.

Creamer and Wickett.

Record.
When a Record of the same Court is pleaded, must reply either *Nul tiel Record*, or crave Oyer of it, and not join Issue on it.

IN Assault and Battery, Defendant pleaded another Action for the same Cause pending in this Court; to which *Nul tiel Record* was replied, and *Habetur tale Record* rejoined; and Plaintiff signed his Judgment for Want of a Plea; and a Rule to shew Cause why a Writ of Enquiry should not be executed. *Northey* shewed for Cause, that a Record of this Court being pleaded, and *Nul tiel Record* replied, there was a full Issue joined; and therefore by Course of Court Plaintiff could not sign his judgment till he had pay'd the Defendant's Attorney for entring his Plea. *Vide Dy.* 228. *Co. Ent.* 138.

And the whole Question was, whether after a Record of the same Court pleaded, it were proper to plead *Nul tiel Record*, and to join Issue upon it, or that Defendant might demur to the Replication.

And it was urged by *Northey*, that if a Record of same Court be pleaded, the Plaintiff may immediately crave Oyer of it; and if the Defendant does not grant it, or produce the Record, there is an End of the Plea; *quod fuit concessum per Cur'*. *Vide 5 H.* 7. 24. But if it be a Record of another Court, the Way is to reply *Nul tiel Record*, and then Day is given to bring it in: But that it was a Doubt in ancient Books, whether *Nul tiel Record* might be pleaded to a Record of same Court; and that it might, he quoted *Buck v. Pierce*, *Mich.* 8. of the King; where the Question was upon such

such a Plea pleaded, and Day given to bring in the Record, and it not produced, whether that were a Failure. *Vide* 256. H. 6. Rot. 424. 1 Inst. 157. and *per Holt*, it has obtained, that when a Record is Pleaded in the same Court, they may reply *Nul tiel Record*; but the proper Way is to crave Oyer, and then a Day is given. And he said a Record might be pleaded by way of Inducement, which is not traversable, and to it *Nul tiel Record* is no Plea; so if Record of an *In-* Vide 1 Saund. 97, 98, 99. Ante p. 215. That he might. Difference, where it is a Record of the same Court, and where of another Court. *ferior Court be pleaded, it is not traversable, because not a good Plea.* And the Case being again moved, it was held *per Cur*, that the Defendant ought not to rejoin, and say *Habetur tale Recordum*; for the Entry upon pleading a Record of this Court is *Quia Cur Domini Reg. adviser vult, &c. ideo dies datus est, &c.* to produce the Record; and if upon Search the Record be found, then the same is shewn in Court, and thereupon Judgment; or if the Record be not found, then there is an Entry of Search, and no Record found, and thereupon Judgment of *Respondeas Ouster*: So Ante p. 214, 215, 267. there are two Ways of replying, when a Record of the same Court is pleaded, either to reply *Nul tiel Record*, as is done here, or to crave Oyer of it; and they relied on the Case in *Dy. 228*. And to what Purpose should one join Issue upon the being of a Record of this Court, when we have them all before us, and may presently know the Matter; and the Difference is between a Record of this Court and of another Court; and Judgment final being entred was set aside, because Failure of Record is not peremptory; and it being upon a Doubt of Practice shall not conclude.

— and *Wats.*

IN Debt against Bail, the Question was, whether they should be admitted to surrender the Principal, as they might upon a *Sci. Fa.* upon two *Nihils* return'd; and it seemed reasonable they should, and made a Rule of Court. In Debt against Bail Principal may be surrendered.

Sci. Fa. recited a Judgment in Time of the King, which in Truth was in the Time of the King and Queen, and so no Judgment to warrant it; and Judgment upon Return of *Nihils. Cur*: In Strictness we ought to put them to *Audita quer*; but we generally relieve them upon Motion, and the Judgment on the *Sci. Fa.* was set aside, and ordered that the Money levied by a *Fi. Fa.* thereupon should be refunded. Scire Facias on a wrong Judgment set aside on Motion.

Horn verſus Luines.

Salk. 583.
Replevin.
In Replevin,
bringing Mo-
ney into Court
on Tender of
Rent is super-
fluous, for
Money is not
demanded, but
whether had
Right to di-
strain; *aliter*
on Debt, or a
Bond.

Not conclu-
ding to the
Country,
where it should
be, is fatal.

IN Replevin the Defendant intitles *7. S.* to a Rent-Charge of 100*l.* a Year in the Place where; and makes Co-nufance as his Servant for a Year's Rent arrear at ſuch a Time: Plaintiff replies, that as to 50*l.* Part of the ſaid Rent ſuppoſed to be due at ſuch a Time, *de injuriâ ſuâ, &c. abſque hoc*, that there was *Riens arriere, et hoc parat. eſt verificare*; and as to the other 50*l.* a Readineſs for Payment of it at Day of Payment; and that he always was, and ſtill is ready to pay it, *et profert in Cur', et petit Judicium de damnis*. Plaintiff by his Bailiff takes the Money out of Court, and traverses his being always ready, &c. and demurs to the firſt Plea ſpecially, becauſe that making a compleat general Iſſue, he ought to have concluded to Coun-try, and not with an Averment; for it was agreed, that if they could not plead it without an Inducement, he muſt have concluded with a Traverſe; but this was no more than *Riens arriere*, and therefore pleadable as ſuch, and then he ought to conclude to Country; and that not concluding to Country, where one ought, was fatal, was quoted 2 *Saund.* 188.

2*d* Exception, That other Part of the Plea was bad, be- cauſe he demands Judgment *de damnis*; for if there be any Thing due to us, we have Cauſe of Diſtreſs, and then he can have no Damages; for if I diſtrain for two Things, and I have Cauſe for the one of them, and not for the other, if I juſtify for any one of them, I ſhall have Return for both. *Hob.* 133. But if I diſtrain two ſeveral Diſtreſſes for two ſe- veral Cauſes; as ſuppoſe two Horſes, one for Treſpaſs, and the other for Rent, there juſtifying for one intitles me to a Return for one only; and the Plaintiff ſhall recover Da- mages for the other.

Another Point in this Caſe was, whether after taking the Money out of Court, he could plead a Demand, and Re- fuſal after, or traverſe the Tender, &c. for Damages; and that he could not, was quoted, 2 *Cr.* 126. 21 *Ed.* 4. 25. *pl.* 39. full in Point. 1 *Inſt.* 107. *a. Contra* theſe Precedents were urg'd, where after Money taken out, Plaintiff re- plied for Damages, *Aſhton, Debt* 278. *Mich.* 14 *Ja.* Rot. 1718. *Raſt.* 159, *lib. pl.* 159. *Raſt.* tit. *Mefne* 7.

Of the other Side it was answered, that Plaintiff could not receive it but as it was tendred; and that it was tendred in Discharge of Damages.

And that what amounts to General Issue may be pleaded with an *Absque hoc*, they insisted upon the Case in 3 Leon. 239. Kel. 74.

Per Cur': When Money upon a Plea is taken out of Court, the Judgment is *eat inde quietus sine die*; for when the Defendant brings in the Money, Plaintiff by taking it out agrees with Defendant's Allegation. And they said, they knew no Case where Damages are only accessary; and the Plaintiff by his own Act bars himself from Judgment for the Principal, that he shall have Judgment for the Accessary. But in Ejectment, where the Term is expired during the Plea, it is otherwise. And as to one Half-Year's Rent, whereof he pleads a Tender, if he had pleaded a Tender right, it had been a good Plea according to *Hob.* 207. for he could not distrain after without making a Demand in case of Rent Charge or Seck.

Then suppose the Tender be well pleaded, the bringing the Money into Court is superfluous in Case of an Avowry; but in Debt upon Bill or Bond, Tender & *adhuc parat'* is the Plea, and there it is necessary to bring the Money into Court to save Damages. But the Money is not demanded here, for it is a Replevin for Goods; and Question only is, whether he had a Right to distrain; for if he had not, there ought to be Damages against him, and no Return; if he had, he ought to have Return of the Distress.

But here there was no Tender pleaded, but only *paratus fuit* on the Land; for be the Grantee present or absent, there ought to be an *Obtulit* pleaded; and that he did not come to receive it. And if your Plea be bad, as questionless it is, and you bring Money into Court, and their Bailiff takes it out, both your bringing it in, and their taking it out is impertinent; and since your Plea is bad, what he says after is not material; for here is a good Avowry, and no good Answer to it: For tho' he never did demand, yet if you never did tender, he may distrain without any Demand at all; and to make the Distress tortious you should have pleaded a Tender; and therefore tho' Money be brought into Court by you, and taken out by them, we ought to award a Return; take Advantage of the Money's being taken out as you can.

Then as to the Traverse, that the Distress was *de Injuria sua propria*, *absque hoc*, that there was *aliquid a retro*; the

Question is, whether it be well pleaded; it is the same as *Riens arriere*, and *Riens arriere* is the General Issue in an Avowry; for the Lord justifies because there is so much Rent behind, and the Tenant pleads *Riens arriere, et de hoc, &c.* which is the proper way; and instead of this you come with a Circumlocution of an Inducement, and an *Absque hoc*; and this, tho' it be but Form, yet it is legal Form, and such as the Law will have observed.

Where General Issue is specially pleaded, Colour should be given, else good Cause for Demurrer.

Vide 1 Vent.
101.
2 Cr. 14.
Yel. 38.

And where one pleads a *General Issue specially, without giving Colour, it is good Cause of Demurrer*; and yet that is but Form, for if he had pleaded the General Issue, he might have given the special Matter in Evidence; but here your Intent by this special Plea was to have forced them to reply, by which you would inconvenience them; for if you had pleaded the General Issue, there had been an End of Pleading. 3 Cr. 754. *Huish's Case*. An *Audita querela* upon a Defeasance of a Recognizance; and it was for Payment of Money at such a Day, and pleaded that he was ready at the Place, and tender'd it, &c. Plaintiff pleads that he was at the Place ready to receive, *absque hoc*, that the other was there to tender; and held the Plea was bad upon the Reasons *supra*. So *Obtulit* is absolutely necessary, and *Paratus* not sufficient. 2dly, 'The bringing of Money into Court does not abate the Writ. 3dly, In Replevin there needs no *Profert in Cur'*, because you do not demand the Thing itself. 4thly, *Riens arriere* is the General Issue, and therefore to be pleaded and concluded so; and tho' pleading it specially be but Form, yet for avoiding Prolixity in Pleading it is bad on Demurrer; and *per Cur'*, Plaintiff had Judgment on both Pleas. *Holt* said that it was not yet settled, whether after Return irreplevifable, if Party tender Arrear to Bailiff, it be good to intitle him to Action for Detainer against Principal; tho' it be so settled in Case of Tender to Principal in *Carpenter's Case*, 8 Co. And he said that he was not satisfied with *Pilkenton's Case* in that Point; for if Bailiff may not distrain, nor receive Money tendred, why shall his Receipt abate a Writ?

Antep. 8,
152.

Note Diversity.

Note; In this Case, upon Point of pleading of Tender, this Diversity was taken by *Holt*, that Tender at Day is no Plea to a single Bill, but only in Bar of Damages; in which Case you must plead it before Imparlance, with a *Touts temps & uncore prist & profert, &c.* but *Tender at Time* is a good Plea to a Penal Bond in Bar, because it saves the Forfeiture, and therefore may be after Imparlance. *Sed vid. 1 Inst. 207. a. 21 Ed. 4. 25. pl. 39.* This seems to hold only where

where the Penal Bond is for doing a collateral Thing, and not where it is for Payment of Money; but *vide* the Case in *Dyer* 300. a. that in case of a Bond for Payment of Money, he may plead Tender, & *uncore prist*, after Imparlance.

Hatcher, a Clerk in Chancery, was committed by my Lord Keeper for sending Writs into the Country with soft Yellow Wax upon them, without being sealed by the Great Seal, as if they had been actually sealed; and this was said to be a very high Misdemeanor, and next to Counterfeiting the Seal; and he was bound himself in 1000*l.* and two more in 500*l.* each, for his Appearance, in Order to an Information for putting Wax to Writs not being sealed.

Pullen versus Purbeck.

E*legit* was sued about eight Years before, and a Return of an Extent thereupon filed then thus, That the Defendant was possessed of Chattels to such a Value, which he had taken in Execution; that besides, the Defendant was seized of a certain Close called *A.* of the yearly Value of 50*l.* a Year; and of a Close called *B.* of the Value of 5*l.* a Year; and of a third Close of the Value of 50*l.* a Year; and so found by the Inquisition; and had no more Lands or Tenements at the Time of the Judgment, or at any Time since; that he delivered to Plaintiff the said Close of *A.* and *C.* to hold *tanquam liber Tenemen*, &c. All this being filed on Record, the Plaintiff, never having entered by Virtue of it, sues out this special *Sci' fac'*, suggesting all this Matter; to which Defendant demurr'd; and this Case was argued several Times; 1st, by *Cheatham* for the Defendant, and *Northey* for the Plaintiff, this Term. For the Plaintiff was quoted *Hob.* 47. that if Execution be sued, and executed by *Elegit* of Lands not extendible by Virtue of it, yet the Execution shall not be thereby merely void; but if Party has any Remedy, it must be by *Audita querela.* 1 *Rol. Ab.* 104. and he said, that tho' it might be said, that such Execution be void in some Books, that is to be understood it may be avoided or voidable, and that ought to be before filing of the Return; and he quoted 1 *H.* 5. c. 5. & — and 1 and 13 *El.* where that Word is to be so understood in an Act of Parliament; and relied on *Hale's* Opinion, 1 *Sid.* 239. that such Extent of more than a Moiety was unavoidable.

voidable, after Return filed. 2 *Inst.* 296. That Extent once filed cannot be set aside, as it may before filing an Examination, if Court see Occasion. 1 *Ed.* 3. *pl.* 44, 49. *Bro. Extent* 5. *Fitz. Extent* 2. 1 *Sid.* 356. 1 *Rol. Rep.* 89. 3 *Cr.* 310. A new *Elegit* was granted, upon Surmise of more Lands than were extended; but if that had not been surmised upon Return of the first, a second *Elegit* would have been merely void. *Vide* 15 *H.* 7. 15. that after *Elegit*, Party cannot have a *Cap'*, or *Fieri fac'*. *Fitz. Extent* 16.

Postea 359,
364.

Vide Mo. 19.
Simile.

To which it was answered by *Northey*, That a Man's Judgment ought to be satisfied; so a Man shall have *Fi' fa' in infinitum*, till the Debt be satisfied; with this Difference, that the last must always recite the former, and what is levied by them, that the Defendant may not be overcharg'd. And as to *Elegits* he took this Difference; 1st, If there be any Error not apparent on the Face of the Return, that may be rectified, upon Examination, before it be filed; otherwise the Filing is conclusive; but if the Error be apparent on the Record, that may be taken Advantage of at any Time: As if Office finds a Man has twenty Acres, when in Truth he has but ten; if that be not avoided before filing, the Party is without Redress, if it does not appear on the Face of the Return. Here we are proper this Way, for if we had brought a Writ of Error, it would be objected, that this is an Error to our Advantage, and therefore not assignable by us: And by the Rules of Authorities, where one does less than his Authority, of entire Thing, it shall be void for all; and if he exceed his Authority, it shall be so too; and here it appears he exceeded his Authority, by extending more than a Moiety; and if we had entered here, we should be found Trespassers in an Ejectment; because the Extent is void in itself; and he quoted 1 *Sid.* 91. that if more than a Moiety be extended, it is merely void. 1 *Vent.* 259. upon the Diversity above-mentioned; and he concluded by saying, that if we shall be estopped to say against the Record, that the Extent is good, in Trespass or Ejectment against us, why may not we say with the Record, that it is bad.

Holt: If one has Judgment for 20*l.* and sues *Elegit*, and Sheriff returns, that he has levied 10*l.* of his Goods and Chattels, and that he has no Lands; and after Lands come to him, Plaintiff shall have a *Sci' fa'* to extend those Lands; for it is the Extending the Lands, and not the Suing the Writ, that does conclude; and there, if one sues an
Elegit

Elegit against one, and Return is made, that he has no Lands, he may sue any new Execution; but if Lands to ever so small a Value be extended, he is thereby concluded. If Office find a Man has twenty Acres, when in Truth he has but ten, and those ten are extended, the Execution is good, while it stands; but he seemed to be of Opinion, he might be relieved by *Audita querela*. But if there be two Judgments of 100 *l.* each, and *Elegit* on one, and Inquisition finds he has twenty Acres, and ten of them are extended; and then an *Elegit* is sued upon the other, and Inquisition finds he has twenty Acres, and thereupon the other ten Acres are extended, no *Audita querela* lies; at which Sir B. Shower, at the Bar, shook his Head; whereupon Holt said, on his Word it was true; and they all agreed, that if it appeared on the Record to be void, it might be given in Evidence; and Holt said, it would be hard to avoid it by *Audita querela*, for that would pull up all by the Roots.

If on *Elegit* Return be made, that has no Lands, may have a new Execution; but if any Lands are found, he is concluded.

1 Sid. 91, 239.
1 Ven. 259.

This Case was next argued in another Term, by Sir B. Shower for Defendant, and *Cheshire* for the Plaintiff.

Shower: This Sort of Execution was not at Common Law, but created by *Westm. 2. c. 18.* as appears by the Statute, 1 *Inst.* 394. 3 *Co.* Sir William Harbert's Case; the common Process was only a *Fi fa*, or a *Levari*. So this Statute gives a Man a Liberty of choosing to have all his Goods and Chattels, except, &c. and a Moiety of Lands and Tenements; and once he determines that Election, and the Effect thereof appears on Record, he shall never after betake himself to a new Remedy; but if he has Judgment upon this, he may have any new Execution he pleases, by *Capias*, *Fi fa*, *Levari* or *Elegit*; which the Law does not allow after Election. *Br. Elegit*; after *Elegit* one shall have no other Process. 19 *H. 6.* 4. 1 *Rol. Ab.* 904. 2 *Rol. Rep.* 8, 9, 77. And an *Elegit* is a Judgment in its Nature; for after he has made this Choice it amounts to a Judgment, that he shall have all his Goods and Chattels, and *medietatem terræ*; tho' there be no Form of Words importing an Award of the Court; yet the Writ issuing by Virtue of the Statute, which tantamounts as if the Court had said *super quo*, &c. and therefore he can never be admitted to demand another Execution generally; and here the Judgment, if any, must be general, for the Prayer is so; and Judgment must be according to the Prayer.

2^{dly}, They should not make their Prayer to have Execution as this is, generally, to have Execution of the rest of their Debt; but it should be pursuant to their Suggestion,

to have a new Extent of a Moiety, or a new *Elegit*; for tho' they would have the Extent void, because more than a Moiety, yet the Fault of the Extent cannot avoid the Prayer of an *Elegit*, which has been made; therefore he should have a new one; for subsequent Act of the Officer cannot alter the Plaintiff's Prayer; and they there perhaps will award them one, to do now well, what the Officer has done ill before.

3dly, 'This Extent cannot be supposed void; *vide* 1 *Rol. Abr.* 305. *pl.* 8. this very Case in Point; that Extent was not void, but voidable by *Audita querela*, *vide* 3 *Cr.* 310. *Per Popham*; if it appear that the Plaintiff had Extent by former *Elegit*, which he accepted, he cannot have a new *Elegit*; and if he takes one it will be void; but upon a Surmise of more or less Lands upon the Return of the first, he may have a new *Elegit*; and as to its being void or voidable he quoted *Hob.* 48. 1 *Rol. Ab.* 304.

If Extent be avoided by *Audita querela*, must account for mean Profits.

There are many Cases where Extent shall be void; as if a Stranger's Land be extended; but the Extent is of Defendant's Lands; and if there be any Wrong, it is to him, and not to Plaintiff. 4 *Co.* 67. If Conussee enters before any Return of Execution, he is a good Tenant, tho' the common Way be to bring Ejectment; yet if the Plaintiff enters, he has a good Title against every Body, till Debt be satisfied; so they may enter and hold here, after this Return; and if we had brought an *Audita querela*, it would only avoid the Surplusage; *quod Holt negavit*; for he said, it would avoid all, and make him account for the mean Profits.

Vide 3 *Keb.* 243. *Dawson* and *Jefferson*; a *Venire fac'* to try an Issue; Jury find more than was put in Issue, and void only for Surplusage, and new *Venire fac'* shall not go; for where an Authority is exceeded, all shall not be void, but only the Excess; but where the Sheriff has no Authority at all, it is not so; as where he extends Land of a Stranger; and a new *Elegit* they cannot have for Lands only; and they have all his Goods already, and no Suggestion that he has any since.

He concluded, that there was no judicial Opinion against him; for 1 *Vent.* 295. was only a Saying upon Motion; and that 3 *Keb.* 313. was but the same Case; and that none will dispute but the Defendant may have an *Audita querela* here; which shews the Extent is not merely void.

Cheshire cont. The first Execution is void; for the *Elegit*, by the Statute, is a new Authority to the Sheriff; which
by

by Rule of Authorities ought to be pursued strictly, or else what is done upon it is void; notwithstanding the Favour the Law gives to Executions; if the Sheriff had extended all the Defendant's Land, that had been merely void, because he had exceeded his Authority; and that he does by extending any Thing more, as well as by extending all. *1 Vent. 259. Office of Sheriff 135. 12 Ed. 4. 2. Br. Elegit 14. Of two Acres Sheriff may extend one; or of two Manors one, if they be of equal Value; but a void Act is not capable of a Magis & Minus.* *1 Vent. 259. 1 Sid. 91. 239. 1 Brownl 96. 1 Lev. 160.*

An Act of Parliament, introductive of a new Law in the Affirmative, is Negative of what is not expressed therein. *Plow. 109, 113, 206. Hob. 298.* So has the Construction been made upon another Branch, which impowers Sheriff to take all the Party's Goods and Chattels, except *averia caruca*; and if he take them, Trespass will lie against him. *2 Inst. 133, 395, 396. Elegit* lies not against an Infant, tho' there be no Exception of Infancy in the Statute; because the Privilege of Infancy shall not be taken away by affirmative Words: So if Trespass lies for taking *averia caruca*, because of the Exception of the Statute, this being an affirmative Law, &c. is the same as if there were an Exception of a Moiety.

Where there is any Matter *dehors* which may avoid the Extent, that must be complained of before Return filed, or by *Audita querela*, because the Fact may be controverted. But where it appears on Record of the Return filed, it is a *Felo de se*, and needs no more to shew it ill done; as if Judgment were, that Sheriff should extend more than a Moiety, it would be ill. *Ante p. 356. Postea 364.*

As for *Row* and *Week's* Case, there is no Reason given for it; and a Man may be over cautious, and bring *Audita querela* without Necessity; *vide Hetl. 66. Lit. Rep. 77.* to this Purpose.

Obj. We have accepted this Extent, and have acquiesced for nine Years. *Answ.* That depends upon this, whether the Extent be void or voidable; if only voidable, it is against me; if void, that must be absolutely void, or void or voidable at Election; if void or voidable, our Acceptance makes it good; if absolutely void, as I contend it is, no Act or Acceptance of ours can help it; as *vide 1 Inst. 300.* Thing may be made good by Confirmation; if Tenant in Tail make a Lease not warranted by the Statute, it is void or voidable, at Election of the Issue. But this is not an imperfect Conveyance of an Interest; but we say a void Execution of a Process

Process of Law, which we can no more make good, than we can make a good one void.

If no Land be extended upon an *Elegit*, it is only in Nature of a *Sci' fa'*; *vide Hob. ubi supra*; and if we are bound by Acceptance of more than a Moiety, they ought to be so too; for it were absurd we should be tied, and they loose; and by this Argument, Acceptance of the whole would be good.

A Deed indeed may be good against one, and void against another; good against one's self, and void as to Privies; as Deed of *Non Compos* is good against himself, and void against Heirs, Executors, &c. but the Reason of that is a particular Maxim in Law, that a Person of full Age shall not stultify himself; but that Case is not like ours, which can better be compared to inferior Jurisdiction; as in case of proceeding in *Marshalsea*, where they have not Jurisdiction, he may against his own Suit say, that they are void. 2 Cr. 353. Mo. 787. Prohibition to stay the Party's own Suit, and yet there Jurisdiction might be made.

4 Co. *Vernon's Case*; If Jointure be made for Life of Husband, Remainder to another for Life; Remainder to Wife for Life, for her Jointure; tho' he in Remainder dies, living Husband, and that after Husband's Life Wife enters, it is not thereby made a good Jointure; because at first creating it was not a good Jointure. 4 Co. 9. If a Person qualified to keep two Chaplains, retain three, and one of them dies before any of them is advanced to a Benefice; yet none of the other two are qualified for a Plurality, because of the original ill Retainer, being not pursuant to the Authority of the Statute. 10 Co. 32. If Bishop make Lease for four Lives, and one of the Lives expire, Bishop dies, his Successor shall avoid it, tho' it have all the Qualifications except a legal Commencement; but that exceeding the Authority given by Statute, it is void for all. Sir J. Davis's Reports, 44, 48. The Dean put his Seal to a Lease, without the Consent of major Part of the Chapter, but they assented to it after, yet it was void. Bro. Judgment 148. If after the Statute of 11 H. 7. he in Reversion release to Alience of Wife, without his Consent, Release is void; because it appears not of Record. If upon the Statute of *Acton Burnell*, Lands be extended at two high a Rate, the Conusee may pray that Extender may take them at that Rate, and pay him; and thereupon Sheriff may deliver the Land to the Extenders. 44 Ed. 3. 2. Mo. 753. but there the Party
must

must make his Challenge at the first Day of Return, because he has an Election to except, or take the Land.

We cannot be estopped here, because a void Act cannot work an Estoppel. 14 H. 7. (4.) 22. *Hard. 405. No Record estops, if the Court has not Jurisdiction; and every Estoppel is reciprocal.* 1 *Inst.* 352. Estoppels must either bind both or neither; so if they be not bound, if we should bring an Ejectment, we cannot be bound now.

Holt Ch. J. upon the Argument now, said, that what stuck with him most, was the Acceptance and Length of Time; for the Sheriff return'd, that he had delivered the Land in Execution, which imports an Acceptance, and now he comes to avoid his Acceptance after so long Time; and where one comes to disapprove an Extent upon a Statute-Merchant, he must say, that he has not accepted. So here, why should he not come and shew that more than a Moiety was extended: And if Sheriff will return *Liberavi parti* where he refuses to accept, Action will lie against him for a false Return. And tho' it be a Rule, that Things *ipso facto* void cannot be made good by Acceptance, yet it is not without Exception; as Tenant in Tail makes a Lease to commence *in futuro*, and dies before the Day, the Lessor enters, Issue in Tail may have Trespass against him, or he may by Acceptance make it good.

Tenant in Tail makes a Lease to commence *in futuro*, and after makes a Feoffment in Fee, and Lease commences, Feoffee may avoid it, or make it good by Acceptance. Tenant in Tail of a Rent grants it in Fee, it is void by his Death; but if Issue affirms it to be good, and brings a *Formedon*, he may be barr'd by Warranty.

If Land of one Purchasor be extended, and Lands of another Purchasor omitted, if he whose Land is extended bring *Aud quer'*, he shall avoid the whole; and there are two Writs in such Cases; the one an *Audita querela*, the other only for Contribution: And he said, the Case in *Brownl.* may be good or bad Law, as it is put; for if there be two Judgments, and the Defendant is seised of twenty Acres, and a Moiety of them is extended upon one, and an Extent goes upon the other; and Inquisition thereupon finds him seised of twenty Acres, without any Notice of the former Extent, and hereupon the other Moiety is extended; this is well, tho' in Truth a Moiety of the remaining Moiety ought to be extended. And if the Land of one Purchasor only be extended, the Plaintiff has no Remedy; yet the Defendant has Remedy by *Audita querela*, and will make the Plaintiff ac-

count to him for all the mean Profits. If there be two bound jointly and severally in a Bond, and one of them is sued first, and Judgment is against him, and the other is sued, and Judgment likewise against him, the first is taken in Execution, and after *Elegit* against the other, whereupon his Lands are extended; the first shall be discharged upon *Audita quer*.

Pratt Serjeant, in *Trinity* Term after, argued for the Defendant, and *Hall* Serjeant for the Plaintiff; and *Pratt* argued that the Extent was not meerly void; and that if it were void, or voidable at Election, it was only so at Election of Defendant, and not of Plaintiff; and this being a just Debt, which the Defendant must pay one Time or other, he may think it an Advantage to have more than a Moiety of his Land extended, for that the Incumbrance may be the sooner discharged; and that this was agreeable to the Reason of the Law in other Cases; as in case of an Infant, who, wanting Understanding to contract, cannot by any Act of his bind himself, except for Necessaries; yet he may make a Lease, reserving Rent, which tho' void absolutely, yet because possibly it may be for his Advantage, he may allow of it when he comes of Age; or he may have Trespass against Lessee for Entry; or bring Debt for the Rent, and make it good. 18 *Ed.* 4. 1. *a.* 2. *a.* 3. *b.* 4. *a.* where in Trespass, Lessee justified as Lessee of Plaintiff, who replied Non-age in him at Time of Lease made; and adjudged he might have Trespass or Debt for the Rent. So of Sale of Goods by Infant, he may have Trespass for taking, or Debt upon Contract; and it is made a *Quare*, if Infant sells a Horse, and takes the Money for him, whether he should have Trespass; but if Infant makes Feoffment and Livery, it is not void, but voidable; but if the Livery be not by his own Hands, it is void. So if Feme Covert make a Lease, it is void; but if she joins with her Husband in a Lease of her Land, it is at her Election, after Husband's Death, to affirm or avoid it, because it may be for her Advantage: So here it may by Possibility be for the Advantage of Defendant to have more than a Moiety extended; therefore he ought to have the Election to affirm this Extent or not; and this Rule holds even upon Constructions upon Acts of Parliament; as by the Statute of *Donis*, there is an express Disability upon Donee or Issues from Alienating to bar the Issue; and Tenant in Tail has no more Power to make a Lease to bind the Land after his Death, than the Sheriff to extend more than a Moiety, by this Statute; yet if Tenant in Tail make such a Lease, his Issue

may make it good, if he please; because it may possibly be for his Advantage so to do; and a Successor may make a Lease good, not warranted by the disabling Statute of Queen Elizabeth.

Obj. Sheriff has but a bare Authority, which he must pursue strictly, otherwise his Act is intirely void; and what is altogether void, cannot be made good by any subsequent Agreement. *Vide Penant's Case*, 3 Co. Lease for Years, with Condition upon Non-payment of Rent at a Day certain to be void; no subsequent Acceptance will make such a Lease good; which Case I agree to be Law; for there Lessor has made his Election by demanding the Rent, without which the Lease had not been void; and since by his own Act, viz. the Demand, he has made the Lease void, there is no Reason that after, by another contrary Act, he should make it good.

Another Case is, where Tenant in Tail makes Lease, reserving Rent, and dies without Issue, he in Remainder cannot by Acceptance make it good; which Case I agree to be Law, but not like this; for the Rent reserved, which is the Recompence, cannot go to him in Remainder for Want of Privity; and so it cannot be supposed for his Advantage to have Power to affirm the Lease: Nor is the Case of Tenant at Will more like, for the Lease is at Will of both Parties, and by Consequence must necessarily determine upon either Party's ceasing to have a Will of continuing it.

And in many Cases, where one enters by Colour of Authority, without any Right, yet if it be for the Good of him that has Right, he may make that colourable Right, or Act, good; as if one enter upon an Infant, he may charge him as Guardian, or bring Disseisin, at his Pleasure.

Bro. Account 22. If a Man receives my Rent, I may charge him as Disseisor, or have Account against him. So in an Account for Money received to Plaintiff's Use, Defendant shall not be admitted to say, that he is a Wrong-Doer; and therefore such an Action will not lie against him. So if one enter into an Office, he shall be look'd upon as Bailiff of the right Owner, if he please; for if he, to whom a Wrong is done, will take it as no Wrong, the Wrong-Doer shall not have Power to hinder himself from being charged, as one having lawful Title or Authority; and his own Acceptance was so binding, that tho' it were all evicted after, yet he had no Remedy. 1 *Inst.* 289, 290. And, to fortify the Acceptance, he put the Case, where a Man takes a Lease of his own Land, it is good against him, and he shall pay Rent because

because of his Acceptance by Deed; so here it appears that he has accepted of Record.

Hall, Serjeant, *contra*: He divided the Case into two Points; 1st, Whether an *Elegit* returned and filed here, should be a Bar of a new *Elegit*. 2^{dly}, If it does not, whether the *Sci. Fa.* to have a new Execution be good.

Nota the
Case in Dyer.

As to the 1st, That the new *Elegit* was void, the Sheriff having exceeded his Authority; for he said all Authorities, whether Judicial or Ministerial, or private by one Person to another, must be pursued; for when one has no Right to do a Thing, but by a derivative Power, he must shew he has pursued his Power; and especially if the Thing to be done be entire, and more is done than warranted by the Power, all is void; and here the Sheriff had no Power to extend more than a Moiety. *Vide* 22 *Ed.* 4. 13. *a.* If Court of Common Pleas hold Plea of Murder, it is meerly void. 19 *Ed.* 4. 8. *Kelway* 106. *Dy.* 135. *b.* Citation in Admiralty for Cause arising within Body of County, Suit in *Marshalsea* where neither Party is of the *Hostel*. Sir *J. Davis* 46, 47. 10 *Co.* Case of *Marshalsea*, March 8, 10. And as to private Authorities, he quoted 1 *Inst.* 303. 49, &c. *Cr. Ca.* 335. 1 *Leo.* 35. 8 *Co.* 119. *Plow.* 393. *Hard.* 481. If Commissioners of Excise act beyond their Commission, they cease to be Officers *pro tunc*; so Sheriff here exceeding Power given by Writ, what he has done is just as if he had had no Writ at all. 7 *Ed.* 4. 4. 21 *H.* 7. 19. 2 *Brownl.* 96, 97. for 2. *Elegit* and other Process after *Elegit*, and the whole void, because exceeding Authority. *Cr. El.* 160. *Elegit*, return'd Extent, but he could not deliver them, because they were in Execution upon prior Extent; and thereupon Party took a *Capias*; and on Debate held no *Superfedeas* ought to go, because otherwise he could not have present Fruit of his Judgment. So in like Manner here it appears we can have no Benefit of the *Elegit*; for if we enter upon this Extent, we are Trespassers. 18 *Ed.* 4. 4. 1 *Sid.* 184. 3 *Keb.* 105, 261.

Ante p. 356,
359.

And he quoted *Hob.* 57. If Plaintiff take an *Elegit*, and can have no Fruit of it, he may take any other Execution, or have Debt upon the Judgment: And the Statute never meant to defraud the Plaintiff of a just Debt; and he insisted on the Diversity before mentioned, where, upon the Face of the Return, it appears that more than a Moiety was extended, and where not, which reconciles all the Books. 1 *Sid.* 239. 2 *Inst.* 396. 2 *Vent.* 239. 3 *Keb.* 315. *Litt. Rep.* 77.

And as to the Objection, that the *Sci. Fa.* was generally to have Execution, when it should be special, to have a new Writ of *Elegit*, pursuant to the first Election; he said it was better as it was, for if Court should be of Opinion to give Judgment for Execution generally, they could not do it if the Writ were special, as they may do as it is; and that on the other Hand they might give a special Judgment on this general Writ, for the Writ recites the whole Matter, and pray convenient Remedy, which Court will give *secundum subjectam materiam*.

Obj. One shall not assign for Error that which is for his Advantage; and that is a true Rule according to *Beecher's Case*, 8 Co. 2 *Saund.* 45. *Bendl.* 154. One shall not say his Declaration was bad to save Costs, and the Reason is, because then one would take Advantage of his own Wrong to the Prejudice of another; but this is Wrong of Sheriff, and the Error we assign is an Ease to Defendant to have but a Moiety of his Land extended.

Then the Case in 1 *Ro. Ab.* 305. p. 8. is indeed the *R. A.* 303. strongest Case against me; there it did appear upon the Return, that more than a Moiety was extended; and yet the Book says the Defendant cannot avoid it, but by *Audita quer'*: But to that I answer,

1st, That it must be intended that the Plaintiff had entered by Virtue of the Extent, for the Book is the Plaintiff's Entry was no Disseisin; and it may be then after actual Entry Defendant is put to *Audita quer'*; but here an Entry cannot be supposed, because we say Execution remains to be made. 2^{dly}, The Writ of *Audita quer'* must have been brought by Defendant; but we are Plaintiff, and no such Writ lies for us. 3^{dly}, If it had appeared to the Court only by Affidavits, that more than a Moiety was extended, it would be hard to relieve, even upon *Audita quer'*, because of the Danger of avoiding a Record by Affidavits. 4^{thly}, This Case is not found in any other Book.

Obj. The Return of a Delivery to us amounts to an Acceptance and Entry by us.

Answ. Every Acceptance or Satisfaction implies two Things: 1st. Good Authority in him that gives the Satisfaction. 2^{dly}, Consent of him to whom it is given in Satisfaction, to receive it in Satisfaction; but here appears no Acceptance by us, and the Sheriff does not return that he delivered us the Possession: And he urged the Case in *Dyer* 299. pl. 31. where Execution being sued by Executor of Conussee, and the Death of the Conusor returned, and that

he died seized of the Manor of *Brodley*, without shewing of what Estate; and after *Liberate* thereupon, and a Return of Service thereof, and that the Executors had accepted thereof; and held that the first Execution was void, and that a new Extent should go. *Vide Cr. El.* 310.

Holt: Sure Delivery implies an Acceptance; and he said, it had been very proper to come and oppose the Filing; and he said, that Delivery in this, is as complete a Possession as is given upon an *Hab. Fac. Seisinam* upon a Recovery to Use; for that Possession is not actual, but only such as vests the Right in the Plaintiff, and makes the other continuing in a Wrong-Doer; whereupon he may bring his Ejectment; and we ought to intend an actual Entry, if Disturbance appear not, and the Estate of Tenant by *Elegit* determines without more ado, upon levying of the Money by Effluention of Time, if Eviction or Expulsion appear not. And at Common Law, if Land of one Purchaser only had been extended, he might have avoided Extent, yet it was good against Plaintiff till avoided; but he concluded that he thought the Extent was void, but doubted only upon the Acceptance; and he agreed, if Extent be void, and Plaintiff entered by Virtue of it, he would be a Trespasser; and that Party cannot aver against Sheriff's Return.

At last it was argued in *Hill.* 13 W. 3. by *Cowper* for Defendant, and *Mulso* for the Plaintiff, upon the single Point of Acceptance. *Cowper* 1. It is agreed that Prayer of an *Elegit*, and an Entry thereof on Record, is no Bar of another Execution, because the bare taking out the Writ is not the Election; for tho' *Elegit* be taken out, and Goods taken in Execution upon it, and no Lands extended; this does not conclude from taking out a new Execution; and this *Hob.* himself, who would carry the Matter very far, does agree. And this appears by the Statute of 32 H. 8 c. 5. before which if Lands in Execution had been evicted, the Plaintiff had no Remedy; but now that Statute gives *Sci. Fa.* to have Execution of the Residue; and he concluded from thence, that if this *Sci. Fa.* lay not upon the Statute, it would lie not at all.

Before and since that Statute one may have several Writs of *Elegit*, but they must be the same continued Execution; for a Man cannot have two Writs of *Elegit*, to execute one first, and then another, but they must be one continued Execution, as an *Alias* and *Pluries*: Upon *Nil* returned upon the first, he may have a second, which is a Continuance of the first. 21 H. 7. 19. *Br. Elegit* 17. *Elegit* may go upon

a *Testatum* into another County, or upon an *Alias Testatum* into the same County; but there the Plaintiff must come into the Court and have an Entry made, &c. *Cr. El.* 310. One may have several *Elegits* into several Counties, but that still is but one Execution. *Rast.* 265. a. *Petit separalia brevia*; but once *Elegit* is return'd executed, if Party don't immediately come and except to it, it is final. *Cr. Ja.* 338. 1 *Rol. Rep.* 8. That taking Extent of Lands upon an *Elegit*, is like taking a Lease for Years in Satisfaction of your Debt; so that the Extent is a Satisfaction in Law. 22 *Ed.* 3. 17. *Ass. pl.* 44. That there may be a Re-extent for the Plaintiff as for Defendant, but held it must be when he comes at the Return of Writ, and shews Reason before it is filed. So is 44 *Ed.* 3. (2.) *pl.* 15. Conussee after Return filed, pray'd the Extenders should take the Land according to the Statute of *Acton Burnell*; but Court told him he was too late, for the Sheriff had returned that he had accepted the Land. *Fitz. Extent* 12. 19 *Ed.* Land was extended twice, and Conusor could have no Remedy, because he did not come at the first Day. *Mo.* 341. 1 *Ro. Ab.* 204. *Cr. El.* 310. he said were for him: It was a Sale of a Term by Virtue of a second *Elegit*, after a former return'd and fil'd; and held that the second was only voidable at most. But *Moor* says, that if it appeared that the Land upon the first *Elegit* had been extended and accepted, and that after he took a new *Elegit* and extended other Lands, it were utterly void; for upon Return of the first on Record, the Plaintiff is out of Court. And *Poph.* in 3 *Cr.* 310. says, *Super quo*, the Plaintiff came, viz. at the Return of the Writ: And the Word (*such*) is remarkable in the Report of the Case in *Moor*; but it is objected, that in none of the Cases aforesaid it appears on the very Return that more than a Moiety was extended. Sure it will not be pretended this Extent is so great a Nullity, as if no *Elegit* had been sued out at all, or but a *Fi. Fa.* for here are Goods in Execution by it, which could not be but upon this Writ; for upon *Elegit* the Goods are to be appriz'd and delivered to the Plaintiff himself; upon a *Fi. Fa.* they are to be sold, and the Money to be given to the Plaintiff. And here the Execution was regularly awarded, and Extent returned and accepted, and Acquiescence of nine Years: And if the Extent be void, they are Disseisor; and the Case in *Rol. Ab.* 305. is full, that Plaintiff would not be a Disseisor in this Case, which proves that this is not a void Extent. 44 *Ed.* 3. 11. *pl.* 14. 22 *Ed.* 3. 14. *pl.* 44. Conussee of Statute

tute Merchant takes an Extent returned of Part of Conusor's Lands, and after pray'd a new Extent; but *per Cur'*, he is too late after Acceptance. *Br. Eleg. 9. pl. 3.* one cannot to Execution of *Elegit* after Acceptance.

Besides, it must be intended the Plaintiff is satisfied by Perception of the Profits all this while; for it cannot be intended he received them to the Use of the Defendant, and if he be satisfied, no Matter how; for if he had accepted a Lease for Years in Satisfaction, it would be well; if one has Judgment against two, and one make Satisfaction, it is enough; *a fortiori* he can't have it against one twice. Then it is for the Advantage of Defendant, that but one Moiety is only extendible, and *Quilibet potest renunciare juri pro se introducto*; why then may not the Defendant here have the Liberty to make this Extent good, rather than be put to his Action for the mean Profits against the Plaintiff; which must be the Consequence of the Case, tho' but six Pence above the Value be extended, if the whole Extent be therefore void?

Obj. It does not appear the Plaintiff ever entred, or took the Profits, for the actual Possession was not in him by the Extent; but his only Way to get it was by Ejectment, which he could not maintain upon this Return, it being not according to the Statute.

Answer. The Plaintiff by the Extent has the legal Estate in him, and it would be a Wrong in the Defendant to continue in after; and an Ejectment is not necessary, but to gain a quiet Possession against such Wrong, which not appearing shall not be presumed, but rather the contrary, for the Law will intend every body innocent till the contrary appear.

Mulso argued much as others had done before him, and upon the same Principles.

Per Cur': Without the Solemnity of Argument on the Bench, this clearly is a void Extent, it appearing on the very Return filed, that more than a Moiety is extended; and without all doubt what is extended beyond a Moiety is without Authority, and therefore void; and since that cannot be sever'd from the rest, it spoils all, and is the same Thing as if nothing at all had been extended: And tho' the Plaintiff did accept it, yet he had no Means to get actual Possession, or to defend his Possession against the Owner of the Land; and so it is *ipso facto* void, and needs no Judgment or *Audita querela* to avoid it, because it is directly against the Statute of *W. 2. c. 18.* by which an *Elegit* is given; and the right Diversity is where the Inequality appears on the

Where on the Return it appears, that more than a Moiety was delivered, it is absolutely void, and needs not Judgment or *Audita querela* to avoid it.

the Return, and where not. So the *Sci. Fa.* reciting this special Matter is very proper, and an Award of Execution was granted *per totam Curiam*.

Thonkin versus Crocker.

EX *motione* Northey the Cursitor, who had made out a Writ of Error wrong, contrary to his Instructions, came and made Affidavit that his Instructions were right; and thereupon he was ruled to amend it, *Nisi*, according to *Blackmore's Case*.

Salk. 49.
Amendment.
Writ of Error
refused to be
amended, tho'
Affidavit
made that the
Cursitor's
Note was
right: — be-
ing to destroy
a Judgment.

The Writ was to certify a Record of a Judgment in the Time of the King, and the Record certified was in Time of the King and Queen; and it was moved to amend the Writ. And it was said if this had been an Original upon a Bond bearing Date in Time of King and Queen, and the Officer had made it upon a Bond in Time of King only, it would be amended; so it ought here, he varying from his Instructions: Here it was agreed that Want of Form in an Original is not at all amendable, as *debet* and *detinet* instead of *detinet*, or *vice versa*. So if Judgment be against five, and one of them dies, and Error is brought and laid *ad Damnum* of four, without mentioning the fifth, this was not amended, because Want of Skill in the Clerk; it was *Walker and Stokes's Case*: But these are Faults in the essential Part of the Writ, whereas this here is but a plain Mistake in not following Instructions. Debt was against an Heir, and not said in Declaration that he bound his Heirs, amended. 1 *Leon.* 134.

Cowper contra. This Original is very different from others, it being to reverse a Judgment, and therefore out of the Letter and Meaning of the Statute of 8 H. 6. c. 12. the Words are, *That the Judges before whom the Record is shall amend Writs, &c. in Affirmance of Judgment, what shall seem to them to be Mistakes of Clerks.* So their Power of Amendment is to affirm, not to reverse Judgments; and he quoted 1 *Ro. Ab.* 154. *Cr. Fa.* 154. that the Record is not removed. *Dyer* 105. a. 206. *Ro. Ab.* 754. And this Amendment contended for would indeed make it a new Writ; and there is no Fault in the Writ, but that it commands them to send a Record which they have not, and they send another. *Vide* 32 H. 6. 12.

Holt: The Design of all Writs of Error is to destroy the Judgment, and the Statute of H. 6. is in Opposition to

that; and this is a good Writ, and there is no Authority to amend a good Writ; and a Record in the late Reign is not one in this Reign; and if Writ of Error of such a Judgment should say *in Cur' nostra*? And there is no Instance of amending Writs of Error. *Et per Cur'* Rule was discharged.

So *Mich.* 11 G. 1. In the Case of *Ginger v. Cooper*, Curfitor had Orders to make out a Writ against five, one being dead; he made out a Writ only against four; and held not amendable; and full Costs given on quashing the Writ of Error.

The King versus Inhab. de Shippingfarrindon.

Order of Justices conclusive, till set aside on Appeal.

Tho' B. R. will not affirm an Order, are not obliged to quash it.

Postea 376.

Nisi prius is on the *Distringas*, that the Parties might know the Jury.

42 E. 3. c. 11.

No Costs for new Trial granted for Irregularity; *aliter* if on the Merits.

A Poor Person was removed by Order of two Justices from *Warwickshire* to *Oxfordshire*, and the Justices of *Oxford* remove him by a new Order to *Barkshire*; and the second Order was quashed *nisi*, for that by the first the Parish in *Oxfordshire* was adjudged to be the Place of his last legal Settlement; and that Order is conclusive to them, till falsified by Appeal, not only as to *Warwick*, but as to all other Places; and the Sessions have no Power to make a new Order; but the Way is to send him back from whence he came, and for the Justices of *Warwick* to make a new Order; and if on Appeal the first Order be confirmed, the Parties are for ever concluded, as to all Places. But at another Day, because it would be a vast Way to send him back, *Holt* said, let it stay; for tho' we cannot affirm it, yet we may stay the Quashing of it. *Note*; Here it was only said, that it appeared to them he was likely to become chargeable, without saying, that it was on Complaint of the Church-wardens, &c. *Holt* said that must be intended.

Per Cur': The Reason why the *Nisi prius* is upon the *Distringas*, is to the End the Jury might be return'd above, that the Parties might know them, in Order to their Challenges; and before the Statute of *Ed. 3. c. 11.* it was always upon the *Venire fac'*.

If new Trial be granted for Irregularity, there shall be no Costs paid for it; but if Defence be made, it may help the Irregularity. If new Trial be upon the Merits of the Cause, there must be Costs: *Per Cur'*.

Butler and Lewin versus —.

THEY brought a joint Action upon the Case, for a false Return to a *Mandamus* to swear them in as Church-wardens of the Parish of —. After Verdict it was moved in Arrest of Judgment, that they had misconceived the Action by making it joint; for the Damages, *viz.* the Loss of Fees, are several; and this Exception weighing much with the Court, the Matter was compromised: And *per Cur'*, here, tho' Motion be made in Arrest of Judgment, yet, if there be no Rule to stay, Plaintiff may sign his Judgment of Course.

Whether joint Action for a false return to a *Mandamus*.
Ante p. 349.

If there be no Rule to stay Judgment, it may be signed.

Writ of Error of a Judgment in a Recognizance upon a *Sci' fac'*, was *Quia in adjudicatione executionis super judicium prad'*, instead of *super recognitionem prad'*, and was for that quash'd.

Error in the Entry of Judgment on Recognizance.

Boise versus Bruerton.

Original sued out to *Suffolk*, and the Action laid in *N.* and Judgment thereupon reversed for this Error.

Original sued out in a different County than where Action laid, ill.

Keeling versus Morrice.

Covenant against Administrator of Assignee of a Term generally in his own Name, upon a Covenant in the original Demise to repair, and a Breach in his Time. And agreed, 1st, That this Covenant ran with the Land, and bound the Possessor without the Word *Assigns*. 5 Co. 15. and Dean and Chapter of *Windsor's Case*, Mo. 399. 1 Cr. 229. Jo. 245. And he shall not say, *I shall not be charged for my own Wrong for Want of Assets*, for it is his own Act to administer, and he is presumed to have known the Covenant annexed to the Leases; as well as Executors, under Pain of *Devastavit*, are obliged to take Notice of their Testator's Debts by Bonds, and give Preference of Payment to them; and he might have discharged himself, by assigning over before Breach. And by the same Reason that he should be charged for the Rent *de bonis propriis*, so he ought here for the Damages. 2 Inst. 302. Executor or Administrator shall be punished for Waste, whether voluntary or permissive, tho' treble Damages are recoverable in it. 1 And. 51, 52. 5 Co. *Hargrave's Case*. Allen 42. And *Jud' pro Quer'*, nisi, before End of the Term.

Covenant against Administrator of Assignee of a Term in Covenant to repair.

Covenant to repair runs with the Land, and binds the Possessor without the Word *Assigns*.

Rule.

Venue.

Rule. The common counter *Affidavit* to hinder the Change of *Venue* is to give Evidence *de materia in exitu*, where the Action is laid.

Car versus King.

Evidence.

DEBT against Husband for the Lodging of his Wife, and Proof only made, that he formerly cohabited with her, and own'd her as his Wife; and held sufficient to charge him; but that he might discharge himself, by giving Elopement in Evidence; for they that will trust a Wife that has eloped, do it at their Peril.

Ante p. 245.

Farmers of Newgate Market versus Dean and Chapter of St. Paul's.

Person claiming the like Interest with that in Controversy, no Witness.

AT *Nisi prius coram Holt*, the Question upon Evidence was, whether every House in the Market round had not so many Feet of Ground towards the Market belonging to it; and *per Holt*, If the Act for Building of *London* orders a Man to build his House contiguous to his Neighbour's Soil, it of necessary Consequence gives you all Easements over your Neighbour's Soil, as Lights, Passage, &c. without which you cannot use your House, but thereby gives no Interest in the Soil. And in this Case, a House-keeper, who pretended the like Interest before his Door, tho' he derived his Title under another Person, was denied to be a Witness.

If one comes in on the *Cepi* in Custody, must plead *instanter*; *aliter* if he has been bail'd, and comes in on the *Cepi*. *Sed per Holt*, no Reason for Difference.

Per Holt: A Difference has been taken, that if one comes in upon a *Cepi Corpus* in Custody, he must plead *instanter*; *secus* where he has been bail'd, and comes in upon the *Cepi*; but sure there is no Reason for this Difference, for the Return is the same in both Cases; and the Party ought not to be the harder used because he could not find Bail.

Stout versus Towler.

Appeal brought by Infant, Sheriff delivers it up to him, who cancels it; adjudged a Contempt, and the Sheriff fined.

SPencer Cowper, Barrister at Law, Justice of Peace, and Captain of the *Militia*, and one *Mason* and *Rogers*, having been indicted and acquitted in *August* before, at *Hartford*

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cancels it; adjudged a Contempt, and the Sheriff fined.

ford Affizes, of the Murder of *S. Stout* a Quaker-woman; an Appeal was brought within the Year, by an Infant twelve Years old only, next Heir to the Deceased, but not mentioned in the Writ to be an Infant; and delivered to the Under-Sheriff, *Towler's* Clerk, in *Towler's* Absence; the Appellant after *Teste*, and before the Return of the Writ, chose the Deceased's Mother for his Guardian, before *Holt* C. J. in his Chambers, and she was then and there accordingly admitted. After the Writ returnable, the Mother of the Appellant, at the Instance and Procurement of *Cowper*, comes and demands the Writ of the Sheriff, and the Sheriff, without any Assurance that the Infant was the Appellant, or that the Party who came with him was his Mother, delivers the Writ to them, who destroy it. All this appearing to the Court, by Sheriff's own Confession, and he being put to answer Interrogatories confessing further, that he, upon Receipt of the Writ, had sent a Copy of it to *Cowper*, the Defendant's Brother, and likewise Notice to *Cowper* the Defendant.

Cowper, the Appellee's Brother, being King's Counsel, Sir *B. Shower* and *Ward* urged in Behalf of the Sheriff, 1st, that the Infant having no Guardian at the Time of the Writ purchased, it was not well sued out. 2^{dly}, Tho' it were rightly sued out, yet the Appellant had a Right to come and recall it; and the Sheriff ought not to deny to give it him; for otherwise he would be liable to an Action, if after such Denial he executed the Writ, and thereby subjected the Appellant to Fine and Imprisonment, in case of Acquittal. *Vide* 3 *Bulst.* 97, 98. 1 *Rol. Rep.* 240, 241. *Latch* 19. That the Sheriff in that Case must take Notice of the Plaintiff, at his Peril. And the Appellant's being an Infant alters not the Case; for the Law, if it enables him to sue out a Writ, will enable him to recall or discontinue it; as a Feme Covert levying a Fine may lay the Uses of it. And 1 *Rol. Ab.* 288. Infant discontinued the Appeal in Despight of the Guardian. 3^{dly}, It was urged, that this Court were not possessed of the Writ till Return, for till then it was not pending; and therefore what is done in Relation to it cannot be a Contempt of the Court, or examinable here. 4^{thly}, The Being of a Guardian here is not material; for he has nothing to do till the Writ is returned, and till then the sole Right is in the Infant.

To which it was answered and resolved, as to the first, that there needs no Guardian till the Writ be returnable; for the Use of a Guardian is to pursue it when it is before the

No Guardian
necessary to
sue out an Ap-
peal for Infant.

the Court, and not, as here, to complain of the Officer for not making a Return; and that any Body might sue out the Writ for the Infant, as well as enter upon a Disseisor of him; and there is no Body in Law whose Writ it is, before the Return, but the Infant's. *2dly*, One of Age may come and recall the Writ; but this being an Infant, it is otherwise; and he could not release this Suit; and if he, at the Return of the Writ, had been present in Court, and the Guardian not there, he should be nonsuited, which puts an End to the Appeal. *Latch* 173. and that shews that the Infant, after Guardian chosen, has nothing more to do with the Matter. Indeed the Court, if they see Occasion, may suffer him to discharge his Guardian, and disavow the Action; but that must be in Court, and the Court may refuse to do it, if they see good Reason in their Discretion. And if an Infant, pending the Suit in Trespass, &c. comes of Age, and Judgment be against him, he shall be fined. The Law in this Case takes Care that the Guardian, such as Court shall appoint, shall sue for the Infant, and the Court and Law have the immediate Care of Infants, as not being able to help themselves; and it were an odd Thing, that an Infant, who cannot otherwise prosecute but by Guardian, should be able to discontinue his Writ; or that he, by himself, could discontinue out of Court what he cannot, by himself, continue in Court.

* If after Writ of Error out and before Return Execution be executed, we would lay them by the Heels.

A Misdemeanor in Officer of Inferior Court, is a Contempt of B. R.

If Appellant be nonsuited King may proceed.

And as to the third Objection, he said, that tho' the Court had not Possession of the Writ till it were return'd, yet sure they may bring their Officer to an Account, what Writs he has returnable in this Court, and * punish him for any Abuse in Relation to them; and such Misdemeanor is a Contempt of the Court; and he quoted the Case of one *Starkey*, Steward of *Windsor* Court, where it was adjudged, that a Misdemeanor in an Inferior Court is an Offence against this Court, and the Case of 28 H. 6. 28. was likewise quoted by him; where a Sheriff was fined 40*l.* for refusing to make a Return; and he said, if any Sheriff in *England* had serv'd him so, he would lay him by the Heels. And here he said, it were better, in this Case, if the Writ had mentioned the Appellant to be an Infant; however, it was well without it: And returning the Writ to the Infant and a Stranger here, is the same as if he had delivered it to a Stranger; if we suffer this to go unpunished, the Subjects must expect but little Justice; for the Sheriffs shall have it in their Power to anticipate our Justice. And this is not a private Matter, but the King is concerned; for tho' the Appellants be nonsuited, yet the King shall proceed upon it; and if the Ap-

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pellee be acquitted before, he must plead it, for we cannot take Notice of it. And here he was judged in Contempt, by *Holt & Gould* against *Turton*, and fined 200 Marks. *Note*; In this Case, the Year having expired, they could not have a new Writ of Course; and for this they petitioned the Lord Keeper for a new Writ; who assembled *Treby* C. J. of the Common Pleas, Sir *John Trevor* Master of the Rolls, and Justice *Powell*, to advise of it; who all agreed, it was discretionary to grant one or no; but agreed it was not proper to do it. Some, especially *Treby*, alledging for Reason, that an Appeal was a revengeful odious Prosecution, and therefore deserved no Incouragement; on which Occasion *Holt*, with great Vehemence and Zeal, said, that he wondered that any *Englishman* should brand an Appeal with the Name of an odious Prosecution; that for his Part he look'd upon it to be a noble Prosecution, and a true Badge of *English* Liberties; and referred to the Statute of *Glocester*, and the Comment thereupon in 2 *Inst.*

Anonymus.

AT *Nisi prius coram Holt*, in an Avowry for a Rent-charge devised to the Plaintiff, he could not produce the Will that belonged to the Devisee of the Lands charged, who claimed them by the same Will; but he produced the Ordinary's Register of the Will, and proved former Payments; and held sufficient Evidence.

Evidence.
In Avowry for a Rent-charge by Devise, the Register of the Will, and former Payments, good Proof.

The Will was, *I devise my Lands in the Parishes of A. and B. to J. S. and I devise a Rent to J. N. out of my Lands in the Parish aforesaid*; and per *Holt*, good to charge the Lands in both Parishes.

Adams versus Arnold.

TRESPASS for an Assault upon the Plaintiff's Wife, and getting her with Child; and what the Wife declared in her Labour rejected to be Evidence. And here *Holt* would not suffer the Plaintiff to discredit a Witness of his own calling, he swearing against him.

Trespas and getting his Wife with Child; what the Woman declared, no Evidence.

The

The Parishes of Ovencot and Grindow.

Sessions can
only affirm or
quash, not
make an Or-
der.

AN Order of Sessions recited an Order of two Justices, for the Settling a poor Person in the Parish of O. and concluded in the Nature of a Special Verdict, viz. *If the Poor of Right belongs to the Parish of O. we confirm, if to the Parish of G. we quash the Order; but to which it does belong of Right, we submit to the Court of B. R.*

1st, It was resolved, the Sessions had no Power to make Orders for settling Poor; but their Business was only to quash or confirm Orders, on Appeal to them.

It was objected, that here no Appeal appearing, the Quarter-Sessions were not legally possessed of the Order, and then it could not be removed by *Certiorari* from the Sessions hither. But *Holt*; it is proper for the Justices, that make the original Order, to bring it to the Sessions, that it may be entered on Record there; and it were to be wished that were practised; as when I receive a Recognizance in my Chamber, I ought to bring it into Court: And since in like Manner, an Order of two Justices may well come to the Quarter-Sessions, by the Hands of the Justices that made it, it may well be removed from thence hither by *Certiorari*.

Obj. against the first Order; It is not enough to say, that the poor Person is likely to become chargeable; for if he brings a Certificate from his former Parish, that in Case he does become chargeable, they will take him back, he is not removeable by the Statute of 9 W. 3. *Per Cur'*: That ought to come of the other Side, and *would be a Ground for an Appeal*. And we are bound *ex debito Justitiæ* to confirm an Order, if nothing appears why it should be set aside; and the Order of Sessions was quashed, and the other confirmed.

Ante p. 370.

Paramour versus Johnson.

Matter in Law,
which avoids
the Action,
may be plead-
ed generally;
and that Mat-
ter given in
Evidence.
Ante p. 97,
101, 121, 214.

A*ssumpsit* upon several Promises; Plea, that Defendant payed such a Sum in Satisfaction of all Promises, till such a Time, which Plaintiff received in Satisfaction; *absque hoc*, that he made any Promise since. Plaintiff demurs; for that the Plea amounted to the General Issue. *Holt*: It is no true Rule, that where Defendant may plead the General Issue, and give the special Matter in Evidence, he shall not plead

plead specially. Wherever you may plead Matter in Law, which avoids the Cause of Action, you may plead generally, and give that Matter in Evidence; or you may plead it specially; and upon all General Issues you may give special Matter in Evidence. If you give Colour, you may plead it specially; as in Debt for Rent, you may plead *Nil debet*, and give Release in Evidence. *Vide Byfield's Case*, 10 Co. where in Trespass for Goods, the Defendant confesses the Taking, but says he bought them in Market overt. But it is Indulgence to give Accord with Satisfaction in Evidence upon *Non assumpsit* pleaded; but that has crept in, and now is settled. But here it appearing the Sums paid were less than those declared upon, Plaintiff had Judgment; the Court holding, if it had been a collateral Satisfaction, the Plea had been good.

Ante p. 354.
Postea Pasch.
13 W. 3.
Saunders's
Case.

Vide 1 Inst.
212. b.

Per Holt: If a Writ of Execution be taken out within the Year, and the Sheriff make no Return to it, upon entering a *Vicecomes non misit breve* once a Year, you may continue it, and not be put to sue a *Sci' fa'*.

Ante p. 84.
Execution af-
ter the Year.

Dominus Rex versus Chaloner.

AN Information was against him for killing my Lord S.'s Dog, setting forth, that Lord S. was riding in the Vill of *D. in Com' Midd'*, and that his Grayhound being *tunc & ibidem* following him, that the Defendant drew his Sword, and *tunc & ibidem* killed the Dog. Not guilty pleaded; and at *Nisi prius* the Defendant *relieta verificatione* confess'd the Action; and the *Postea* was, that at *Nisi prius* at such a Day, the Defendant *relieta verificatione* confessed the Action. *Holt*: You should not have mentioned the *Nisi prius* at all, but have entered it as of a Term before; or, since you have mentioned it, you should have shewed that the Jury was called, &c. and then the Defendant *relieta*, &c. for now you tell us of a *Nisi prius*, and shew nothing that was done there.

On confessing
the Action,
Notice should
not be taken
of the *Nisi*
prius, or should
shew the Jury
were called.

Brotherick excepted, that it did not appear what County the Dog was in; for tho' Lord S. is said to be in *Middlesex*, the Dog might be in another County, and the *adtunc & ibidem* shall only go to the Vill, which may extend to more Counties than one. *Sed per Cur'*, It shall go to both.

Ashmond versus Ranger.

Lord cannot
cut down Tim-
ber on a Co-
pyhold Estate.

TRESPASS by Lessee for Years of a Copyholder's Widow, holding in of her Widow's Estate according to the Custom, against the Lord, for cutting and carrying away several Timber-Trees upon the Copyhold Land; and in this Case several Questions were moved at the Bar. *1st*, Whether the Lord could enter upon the Copyholder, and cut Trees for his own Use. *2^{dly}*, If he could not, in case he did it, what Remedy the Tenant had against him; whether 'Trespas or Case, or both? *3^{dly}*, Whether in case the Lord cannot do it, whether the Tenant may; or in case he cannot justify Cutting, whether by Cutting he forfeits his Estate. And it was said at the Bar, that a Copyholder might cut for necessary Repairs, and Estovers, and not otherwise; therefore the Lord may cut them, or else it would follow, that here would be a noble Wood, and no Body have Right to cut it; and so it would be useless to the Publick, and never to be cut in case of Copyholder in Fee. But *Northey*, who argued thus, said, if the Lord in that Case should cut down all the Wood, or so much of it, as not to leave sufficient for Repair and Estovers, the Tenant's Remedy was by Action upon his Case, and not by Way of 'Trespas; as where a Man grants Estovers out of his Wood, and after cuts all down, or so much, as not to leave sufficient Estovers, his Remedy is Case, and not Trespas. *Mo. 727. Cr. El. 629.* And he said, it was absurd to say that the Lord, who had the Interest of the Trees, should not have Power to cut them; and *Co.* in his 13 *Rep. Heydon* and *Smith's Case*, says the Lord without any special Custom may cut the Trees: And he, that has the special Interest of a Thing, cannot hinder him that has the general Interest from using it; but if he uses it so as to destroy or impair the special Interest, he has his Action upon his Case. And Copyholder for Life cannot open a Mine, for Tenant for Life at Common Law cannot do it.

i Saund. 322.

Contra It was argued, that the Copyholder had the same Interest in the Trees, that he had in the Estate; and there is no Difference between a Copyholder for Life, or in Fee, and Tenant for Life, or in Fee, at Common Law, but what the Custom does make; and they are not bare Tenants at Will, but Tenants at Will *secundum consuet'*, &c. and while they observe the Custom, they have as absolute and as in-

defeasible

defeasible an Estate, as any like Tenant at common Law has. *Vide Litt.* § 77. 2 *H.* 4. 12. where the Question was, whether the Tenant should recover in Value, and not whether the Action lay, for that was taken for granted in respect of the Interest he had in Umbrage, Shrouds, &c. Besides, the Tenant has the absolute Ownership of the Land according to the Estate, and may convey and release his Right at Pleasure; and when he surrenders into the Hands of the Lord to the Use of another, *Cestuy que use* is in from the Surrenderor, and not from the Lord, who is only an Instrument, and he shall plead the Surrender as a Grant from the Surrenderor. So if the Right of every Part of the Land be in him, he necessarily must have a Remedy for an Injury done to his Right, for the Law cannot suffer a Right to be without a Remedy; and that a Copyholder may cut Trees to repair. 1 *Ro. Ab.* 508, 1 *Sid.* 152. That Copyholder may dig a Mine, which Lord cannot do, if he have not a joint Interest with the Copyholder. And if the Lord ejects his Copyhold Tenant, he shall have Trespass against him for it. 2 *Saund.* 422. *Noy* 14. it well lies in this Case. 13 *Co.* 67. 2 *Brownl.* 328. And if he may have Case for Injury done him in the Lord's own Soil, as in the Case before put of the Estovers, sure he may have Trespass for Injury in his own Soil. *Vide Tel.* 104, 105.

Then it was added, that however it would be in Case of a Copyholder, yet it was clearly maintainable here, it being Lessee for Years, who has an Estate at common Law; and it was said Copyholder may make a Lease for Years without any Custom to warrant it.

Holt, C. J. This being by Lessee for Years, without Dispute will not alter the Case, because he is Lessee of a Copyholder, and *nemo potest plus juris in al' transferre quam ipse habet*. But as to the main Point, if the Lord cut down so many Trees, as not to leave sufficient Estovers, &c. the Copyholder shall have Trespass, and the Value of the Trees in Damages; but if he leave sufficient Estovers, then he shall have Trespass too, but shall only recover special Damages, *viz.* for the Loss of his Umbrage, &c. breaking his Close, treading his Grass, &c. And the Tenant has the same customary or possessory Interest in the Trees that he has in the Land; and if the Lord has a Mind to cut Trees, his Business is to compound with the Tenant. 3 *Cro.* 361. that Tenant may lop Under-boughs, and cut for Repair, and Bote. And 3 *Cro.* 5. is not Law, as appears by *Heiden* and *Smith's Case*. 13 *Co.* If Birds build Nests in the Trees, the Eggs

1 *Cro.* 377.

437.

Vide 1 *Cro.*

221.

1 *Jo.* 244.

All Copy-
holders have
Estovers of
Common
Right.
Yelv. 188.
Moor 18, 19.

Eggs are the Tenant's, which shews he has the Possessory Interest in the Trees, tho' his Estate be but for Years. And whether the Lord may cut Trees, leaving sufficient Estovers, is very gently trod on in *Heiden* and *Smith's Case*; but no Copyholder can commit Waste without a special Custom, but all Copyholders have Estovers of common Right. If a Man grant all his Estovers, and cuts down the Wood, or does any other Act whereby the Grantee loses the Benefit of the Grant, Case will lie. And so *Yelv.* and *Goldsborough*. *Et Jud. pro Q.*

Carter versus Palmer.

Bill of Ex-
change pay-
able to Bearer,
not Bill of
Exchange,
tho' declares
on the Custom.

Vide Ante
36. acc'

Palmer had given a Note under his Hand in this Form, *I promise to pay the Bearer so much Money on Demand.* Plaintiff brings his Action, grounding it upon the Custom of Merchants, as if it were a Bill of Exchange; and avers no Consideration. After Verdict upon Motion in Arrest of Judgment, *Holt, C. J.* We will take such a Note *prima facie* for Evidence of Money lent; and tho' they have declared on the Custom, yet we must take care that by such a Drift the Law of *England* be not changed by making all Notes Bills of Exchange. But all seem'd to agree, if it were made payable to him, or Order, the Defendant by that Form had made it negotiable, and by Consequence he would be liable to the Action of Assignee in his own Name; for if a Man who is no Merchant will draw a Bill of Exchange, he is suable upon it, according to the Custom of Merchants, for he makes himself a Merchant *pro tanto*. *Vide 2 Vent. 295.* And Inland Bills were not known till Trade grew to a great Height; and when they obtained, they received the same Law with Outlandish Bills: And he said he remembred that at a Trial upon an Inland Bill before *Hale*, the Defendant's Counsel would put Plaintiff to prove the Custom; but *Hale* said they had a hopeful Point of it. *Et adjorn'.*

Duke of Ormond versus Brierly.

Bond to pro-
secute with
Effect, not
forfeit by get-
ting Injunction.

BOND was taken by the Bailiff of *W.* conditioned, that if Obligor, being Plaintiff in Replevin, should prosecute the Suit with Effect, &c. upon Oyer, Defendant pleads that he did declare and prosecute the Action

Action till such a Time, *prout patet per Record inde*; and that pending the Suit the Defendant died, whereby it did abate by the Act of God. Plaintiff replies, confesses the Plea; but says further, that the Defendant sued an *English* Bill in the *Exchequer*, and there obtained an Injunction to stay Proceedings; whereby the Suit was delayed, so as Judgment could not be had till the Defendant's Death; and upon Demurrer it was urged for the Plaintiff, that by obtaining the Injunction the Defendant had disabled himself for a Time, to prosecute the Suit for a Time; and a temporal Disability of performing a Condition tantamounts to a Forfeiture. *Mo. 400.*

Cur' contra. For he cannot be said not to continue the Suit with Effect till Nonsuit, *Retraxit*, or some other Act, by which here is an End of the Suit; this Bond is in Lieu of Pledges, which the Sheriff is bound to find, and take by the Statute of *W. 2.* and if he failed to find Pledges according to that Statute, he would be liable to the Avowant's Damages, to be recovered by Action against him; and where such Pledges would not be liable, the Obligor that is in lieu of them would not be liable. *Et Jud' pro Def'.* 2 Cro. 68. Ante p. 320.

Nicols versus Bride Bridge.

A Man makes a Bond to *A.* in Trust for *B.* *A.* dies, his Executor receives the Money; it shall not be Assets. Bond in Trust is not Assets.
Per Cur'.

Mikes versus Caly.

IN Case the Plaintiff declared that he was possessed of a Ship ready for a Voyage to *America*, lying in the Harbour of *B.* and was ready to set Sail the first fair Wind; that the Defendant entered upon his Possession, and distrained the Corn with which the Ship was freighted, whereby he lost his Voyage, to his Damage, &c. Case by Master of a Ship for distraining Goods on board, whereby he lost his Voyage.

Plea was, that the said *B.* is an ancient Borough for several hundred Years by such a Name, and after incorporated by Letters Patent by another Name; that Time out of Mind there was an ancient Court in the Borough for Administration of Justice, &c. That the Corporation, Time, whereof, &c. used to repair and maintain the Court-House

at their Charge ; and in Consideration thereof they had 'Time, &c. so much a Sack for all Corn that was sold in that Borough, (in the Name of 'Toll,) by any not Inhabitant or free of the Corporation. That the Corn in Plaintiff's Ship was bought by Persons not Inhabitants, &c. and put on board without paying Toll, and a Prescription for distraining in case of Refusal was laid ; that the Defendant was Bailiff appointed by the Town, as their Bailiff, by Writing under their common Seal ; and upon Demand and Refusal distrained the Corn for the Use of Corporation. Plea was agreed to be bad, chiefly for that it was not laid that it was a Corporation Time out of Mind. 1 *Inst.* 114.

But it was argued, 1st, That as it was laid, the Fact was a Trespass, and therefore the Plaintiff had misconceived his Action ; for general Trespass, and Trespass upon the Case, are different formed Actions, grounded upon different Species of Offences. 4 *Ed.* 3. 24. 2 *Roll. Rep.* 149. *Palmer* 47. 13 *H.* 8. 26. Case for a Nuisance for making a Lime-Kiln, without laying it to be upon the Defendant's own Soil, and held bad ; because, if it were upon Soil of Plaintiff, Trespass were the proper Remedy, and not Case, tho' a consequential Damage, viz. the Loss of Water-Course were laid. *Latch* 65. Case was against a Servant for taking away Goods for which Toll was due, without paying Toll, whereby the Goods were forfeited ; and there it was questioned whether that were Case or Trespass, but held to be proper for Case, because a Servant who had Authority. And it was said that *N. B.* 94. does not warrant the Opinions grounded upon it in 4 *Co.* 94. And he quoted the Case of *Thornton* and *Austine*, *Pasch.* 5 *W.* 3. entered *Hill.* 4. *Rot.* 105. Case was brought for entring into Waste and Driving Cattle, whereby they were damaged ; and Judgment was arrested, for that Trespass lay, and not Case. *Pasch.* 9 *W.* 3. *Gill v. Darle*. Case for cutting the Plaintiff's Corn ; and Judgment arrested, for it should have been general Trespass ; and if every Trespass were turn'd to Case, the King would lose his Fines.

Vide 2 Cro.
50, 123.

It was further urged, that this Action did not lie for the Master ; 1st, For by the same Reason it would lie for every one of the Mariners, for every of them too have lost their Voyage ; and so it would likewise for every of the Owners. 2^{dly}. It were to maintain an Action for consequential Damages, with which a Stranger may dispense : As if I covenant with *A.* to build a House upon his Ground, and *B.* ousts him ; by which I am hindred of performing my Covenant ;

tenant; I cannot have Case against *B.* because *A.* by his Release may make the Hindrance lawful, and so may the Owners do here; and if any Damage was, the Action ought to have been brought by the Owner, and the Master have his Remedy against him.

But *per Cur.*, Plaintiff had Judgment; and *per Holt*, the Master of a Ship is in many respects suable, and may sue in Things concerning the Ship, as well as the Owner: And the Defendant might have Title to the Goods by Sale, or Consignment by the Owners, but that ought to have been pleaded; and what the Master recovers in this Action is to the Use of the Owners. And the Master may bring Action against any Merchant for Freight in his own Name; but *quatenus* Master, he cannot bring Trover for the Ship, but he may have Case, if by a Seizure of the Ship he be hindred of his Voyage, as here; and what is taken from him in relation to the Ship, he shall have Case or Trespass for it at his Election, with this Difference, that if he bring Trespass he must declare upon his Possession; and he shall have Trespass for a Disturbance of him in his Office. *Et per totam Cur. Jud. pro Quer.*

Master may have Case or Trespass at his Election.

Reignolds versus Davis.

Warrant of Attorney to confess Judgment to a Feme sole, who married before Judgment entered; whether it could now be enter'd, and how was the Question. It was agreed it could not be enter'd for the Husband, for that was beyond the Authority given. The Course is to make Affidavit of the Debt's not being satisfied; and now the Wife could not make such Affidavit, for the Money might have been paid to the Husband; nor could the Husband's Affidavit serve, because it might have been paid to the Wife before Marriage; but *videtur* that Point may be cleared by a several Affidavit of each in his Time. And *Holt* said they had better enter it in the Wife's Name as Feme sole; but nothing was done.

How Judgment to be entered on a Warrant of Attorney by Feme sole who after marries.

Note; In a Case where the Controversy was between the Inhabitants of *Spittlefields* and Parish of *St. Andrew*, it was said *per Cur.*, that a Child could not gain a Settlement at Nurse, that a Settlement of Father is so for the Child; and that Place of Child's Birth is Place of his Settlement, till contrary appears.

Settlement of Father is Settlement of Child.

Hanck-

Hanckford versus Mead.

Mistake of
Plaintiff in
Judgment for
Damages a-
mended.
Vide Hob.
327.
1 Vent. 217.

A Judgment for Damages was *quod præd A. recuperet*, in-
stead of *præd B.* and it was amended on Motion: And
Gold, J. quoted a Case of *Cradock and Wills*, where the like
Fault was amended on his Motion after twenty Years Time;
and that the Case in *Stile* — was then denied to be
Law.

Per Cur': An Act of Parliament's Reciting *J. S.* to be
Heir, does not make him so.

Per Cur': We may adjourn a Trial at Bar without Con-
sent of Parties.

Stanhop versus Pemperton.

Damages se-
parated in
Writ of En-
quiry.

WRIT of Error of a Judgment in Common Pleas,
where the Judgment was by Default, and Damages
separated by Writ of Enquiry. *Per Holt*: If there be two
Plaintiffs, in many Cases there may be Judgment for one
Party, and *Non Prof'* entred for the other; and the Judg-
ment upon the *Non Prof'* is *quod eat inde sine Die*; but
where the *Non Prof'* is only for Part of the Thing de-
manded, it amounts to a Release only for so much. And
he said an Attorney might undertake for his Client, but not
release his Cause of Action.

Covenant to
build and re-
pair, does not
bind Assignee,
unless named,
being for a
new Thing.

Covenant was to build a House upon Land demised, be-
fore such a Day, and to keep it in Repair, it was for Les-
see and his Assigns; and after the Day Covenant was brought
against Assignee for not repairing. Defendant pleads the
House was not built before the Day; and upon general De-
murrer, *Jud' pro Q.* It was agreed this would not have
bound Assignee, being for a new Thing, without expressly
naming him. 2dly, That the Plea was a Negative Preg-
nant.

Certiorari
stays Proceed-
ing from
Teste, but the
Contemptonly
from Service.

If *Certiorari* goes to remove a Record, the Judge be-
low is not in Contempt for proceeding on the Record till
Service of the Writ; but all Proceedings upon it after the
Certiorari tested are void. *Per Cur'*.

Payment to Sheriff upon a *Capias ad Satisfaciendum* is not good to discharge the Plaintiff's Debt; and so adjudged and settled in the Sheriff of *Wiltshire's Case*. *Per Cur'*.

Payment to Sheriff on *Capias ad Satisfac'* not good. Ante p. 230.

Once a *Postea* is brought into Court, tho' the Plaintiff take it out again, yet it remains in Possession of the Court, and the Officer of the Court may command the Plaintiff to bring it in; and the Defendant may give the Plaintiff Notice to bring in a *Postea* in order to move in Arrest of Judgment.

After Exception against Bail they must justify themselves, or Plaintiff must withdraw his Exception, before he can proceed to Trial, so as to charge them. *Per Cur'*.

Bail excepted against, must be justified before proceed to Trial.

Siliard versus Cox.

A *Sumpsit* by Administrator: Plea in Bar, that Intestate died at such a Place in another Diocese than that from whose Ordinary the Administration was committed to Plaintiff, and was Inhabitant there at the Time of his Death; upon Demurrer, *Jud' pro Def'*. For if a Man has two Houses in divers Dioceses, his dying in one of them without *bona Notab'* in the other, intitles the Ordinary of that Diocese to Administration; otherwise if he were on a Journey, and so died.

If a Man who has Houses in different Dioceses dies in one, that intitles the Ordinary of it to grant Administration, if he has not *bona Notabilia*.

Crow versus Brown.

Usurious Contract was pleaded in Bar of Debt upon a Bond, but not said that Defendant was indebted to Plaintiff at Time of Bond given, or that there was an Agreement to lend Money upon the usurious Contract; and for that *Jud' nisi pro Quer'*.

Usurious Contract pleaded in Bar of Debt on a Bond.

Per Holt at Nisi prius: I have known it ruled, that a Legatee should not be a Witness to prove Assets in the Hands of Executor in Debt by a Creditor; and it has been an old Exception, but I see not the Reason of it, for he swears to lessen the Assets, and one Creditor may be a Witness to prove Assets in an Action by another Creditor. And the Legatee was sworn.

Legatee admitted to prove Assets in the Hands of Executor, on a Suit by a Creditor.

Doctor Grenville versus College of Physicians.

Salk. 144,

200, 263,

396.

Physician in

London fin'd

and imprison-

ed *pro mala**praxi*, by Con-

sent of the

College of

Physicians.

IN Trespass the Plaintiff declared, That *J. S. &c.* did at such a Place, &c. assault, beat and wound him, and imprisoned him for seven Days. To which there was this special Plea, 1st, As to the *Vi et Armis*, and Wounding, Not guilty. As to *Residuum Transgressionum*, they pleaded the Charter of Incorporation of 10 *H. 8.* and the Act of Parliament of the fourteenth Year of the same King, confirming the said Letters Patent, by which the Physicians of *London* were created a Body Politick and College, and to have four Censors to examine Physick within *London* and seven Miles round it; and that those Censors should be four in Number, to be chosen by them yearly to have Censure and Examination of Drugs and Practisers of Physick within the District aforesaid, and Power to punish, as Charter directs at large. Then they further plead the Statute of *P.* and *M.* by which all Gaolers are commanded to receive into their Custody all Prisoners committed by them; that the Plaintiff was a Practiser of Physick in *London*, and on such a Day and Year of the King did take upon himself to cure the Wife of *A.* for forty Shillings to him in Hand paid; that he did administer such unwholsome and noxious Pills to her, that she became incurable, and so in manifest Danger of her Life, occasioned by such his Physick; that the four Persons in the Declaration were duly chosen Censors; that Complaint was made to them by *A.* the Husband for the said Offence. And he was summon'd to appear, &c. to be examined by them such a Day; that he did appear, and that they proceeded to examine him; and upon the Testimony of several Witnesses, and hearing what he could say for himself, they the said Censors judg'd him guilty of the said ill Practice, and imposed a fine of 20 *l.* upon him, and Imprisonment for twelve Weeks without Bail or Mainprize, unless sooner released by the Master and President of the College of Physicians: That they four did, by a Precept in Writing under their Hands and Seals, command *J. S.* the other Defendant, to take and deliver him to the Keeper of the Gaol of *Newgate*; by Force of which Warrant he the said *J. S.* did so, and that the Keeper kept him in Gaol for the Time in the Declaration.

Repl. That the Plaintiff is a Physician, and was so at the Time of the supposed Offence committed; and *Protestando*

that there is no such Charter, and that he is not an unskilful Physician, and that no Complaint was made by the Husband, and no Judgment by the Censors, for Plea saith, that *de Injur' sua propria* he made the Assault, &c. *absque hoc*, that he did it by Virtue of the said Warrant. And, upon Demurrer, *per Holt, Turton and Gould*, after many Arguments, and great Consideration, *Jud' pro Defendente*: And *Holt* delivered their Opinion thus:

Tho' much has been said to maintain the Replication, yet there is no Colour for it. It was objected, there was a good Traverse of the Warrant, but that cannot be, for there was a Warrant granted and pleaded, and that the Plaintiff was taken by Virtue of it; and he denies his being taken by Virtue of it, but does not traverse the being of a Warrant, for that had been a good Traverse. Suppose one has a legal and an illegal Warrant, and arrests by Virtue of the illegal Warrant, yet he may justify by Virtue of the legal one; for it is not what he declares, but the Authority which he has is his Justification. I suppose the Plaintiff means by this Replication, that the Defendant arrested him by Virtue of some other Authority, and not by this Warrant that is pleaded; but then his Way had been to induce his Traverse by shewing that other Authority, and then to traverse, not as here, *absque hoc*, that it was by Virtue of the Warrant pleaded; but to say that the Defendant did arrest him by Virtue of the other Authority, *absque hoc*, that he had the Warrant pleaded at the Time of the Arrest: So instead of traversing the *Virtut' warranti*, he should have pleaded the Being of the Warrant at that Time. 34 Ed. 1. Fitz. Avovery 332. 3 Co. 26. If one distrains for an unjustifiable Cause, yet when he comes to avow he need not insist on the Cause for which he had distrained, but may justify for any lawful Cause, as for Rent Arrear, tho' he distrained for some other Cause; and the Cause, for which the Distress in Truth was, is not traversable, but *Riens arriere* is the proper Plea.

If one has a legal and illegal Warrant, and arrests by the illegal one, he may justify by the legal one.

Second Point was whether the Defendants have sufficiently intitled themselves to a Jurisdiction to condemn the Plaintiff; and this were a most material Objection if true; but it is most apparent they have done it by setting forth their Charter, confirm'd by Act of Parliament; by which they have a Jurisdiction over his Person as Practiser of Physick, especially if he practises ill. 2dly, They have Jurisdiction over his Practice. 3dly, The Fact which they punish is within the Limits of their Jurisdiction, viz. in London, and their

College of Physicians have Jurisdiction over the Person of a Physician as Practiser.

their Jurisdiction extends seven Miles round; and this Jurisdiction is to be exercised by those that are Censors of the College, which they are shewed to be.

Mala praxis is not traversable.

Where Power is given to hear and determine, the Matter is not traversable.

Where Persons are made Judges, shall not be criminally accused, or liable to Action.

Constable may imprison by Law to prevent Affray, but therein does not act as Judge; and there Action may lie.

Vide Sav. 83. Sav. 115. cont. Wherever there is Power to imprison and fine, are Courts of Record.

Obj. 3. It is apparent this Charge of Male Administration of Physick is traversable; and therefore ought to be sufficiently alledged, as Issue might be taken upon it; and for this is quoted Dr. *Bonham's Case*; for if it be not traversable, the Party committed would be without Remedy, for Writ of Error lies not. But to this we answer, *1st*, That notwithstanding the Opinion in Dr. *Bonham's Case*, the Matter is not traversable. *2dly*, That if it were traversable, Issue might be taken upon it here. *3dly*, If the Plea were defective in that, yet it would not intitle the Plaintiff to his Action.

1st, The Fact is not traversable; and that appears from the Nature of this Authority; for it is an absolute Power given to them to hear and determine such Offences; and thence it does necessarily follow, that the Matter is not traversable; and he shall never arraign their Judgment, but is finally convicted and concluded by it; and such, as are by Law made Judges of another, shall not be criminally accused, or liable to Action of Party for what they do as Judges. 43 *Ed. 3. 9. 9 Ed. 4. 3. 12 Co. 26.* Now, that they have such a judicial Power by their Charter is plain; for they are to examine all Male Administration of Physick, and to give Judgment thereupon; and what is that but to hear and determine. But some indeed have Power to imprison by Law, who do not do it by Way of Punishment, but by Way of Prevention; as a Constable may commit one to prevent a Fray; and therefore, because he does it not as Judge, if he does it *malitiosè* Action will lie against him for it; and there are other ministerial Commitments, as by Justices of Peace, Commissioners of Bankrupt, &c. for which Action may lie. But in this Case the Censors have Power to examine them for ill Practice, and to convict and punish them for the same by Fine and Imprisonment; and this makes them Judges of Record; for whenever there is a Power *de novo* erected by Parliament to convict, and fine and imprison, either of those two make it a Court of Record. 8 *Co. 38.* Leet can fine, but not imprison. 8 *Co. 61.* *Nulla Cur', quæ Recordum non habet, potest finem imponere, nec aliquem carceri mandare, quia ista spectant tantummodo ad curias de Recordis*; therefore these Censors, having a Power to fine and imprison, of Necessity are Judges of Record, and their Court is a Court of Record. 10 *Co. 103.* Discourse upon the Statute of *Westm. 2. c. 11.* concerning Auditors to Account; before

fore that Statute, if one had accounted before Auditors, and were found in Arrear, and Debt were brought for the Arrears, the Defendant might have waged his Law, but he cannot since the Statute; and why? There are no Words in the Statute to take away the Wager of Law, save only, that if the Party be found in Arrear before Auditors, they shall commit him; but the Reason is, that by giving the Auditors Power to commit by the Statute, by necessary Consequence the Auditors are made Judges of Record; and therefore there shall be no Wager of Law against their Proceedings. And if such a Power makes them Judges of Record in that Case, why not in ours? 2 *Inst.* 280. Auditors to Account are allowed to be Judges of Record; and this sure is an Authority in Point for us.

Since by Statute Auditors can fine, are Judges of Record, and therefore Wager of Law will not lie.

Then if the Censors in this Case are Judges of Record, the Consequence is very strong, that no Act of theirs, which they do as Judges, is traversable; and no Averment receivable, that a Judge of Record has acted against his Duty. 47 *Ed.* 3. 50. 1 *H.* 6. 4. 7 *H.* 6. 13, 85. 12 *Co.* 22. 27 *Aff.* pl. 18. A Judge of Oyer and Terminer was indicted, for that he being a Judge, and one being indicted before him for Trespass, he made up the Record to be for Felony; and adjudged the Indictment did not lie, and it was quashed; and that it should never be averred but that it was for Felony; nor could a Judge be supposed guilty of such an Offence.

Against the Act of Judges of Record, no Averment that they have acted against their Duty.

And as to my Lord Coke's Saying in Doctor *Bonham's* Case, we say it was but *obiter*, and not pertinent to the Case; for there the Commitment was for Practising without Licence, and not upon the Clause now in Question; and there they ought to have sued in the Courts of *Westminster-Hall*, and not commit him; and so what my Lord Coke says is no judicial Opinion: Besides, he seems to have been under some Transport, because Doctor *Bonham* was a Graduate of *Cambridge*, his own Mother University. And he himself after, in the same Case, does say, that if the Censors do convict a Man for such Offence, they ought to make a Record of it; and that they cannot do, unless they are Judges of Record; and then we say their Proceedings are untraversable, and they unpunishable for what they do as Judges.

Persons are unpunishable for what they do as Judges.

Obj. 4. Ay, but there is another Reason why this must be traversable, because the Party has no other Remedy; for he cannot have a Writ of Error.

1st, We answer, The Party is not without Remedy, and that as good as a Writ of Error. 2^{dly}, Suppose he had no

5 G

Remedy;

Error will not
lie on a new
created Juris-
diction, un-
known to
Common
Law;

but may have
Certiorari.
Vide ante
p. 146.

1 Vent. 66.
Orders of Sew-
ers removable
into B. R.
Postea Trin.
12 W. 3.
Dom' Regina
v. Inhabitants
de Glamorgan-
shire.

Remedy; yet that would be no Reason why he should of Necessity have Leave to Traverse. And as to the first,

I agree, a Writ of Error does not lie; because it is a new Way of Proceeding unknown to the Common Law, and not according to its Rules. For they need not proceed pursuant to the Methods of Law, nor need they Indictment or Jury; nor in their Judgments say, *ideo consideratum est*; but may say, they judge him guilty, and that he ought to pay so much Money, &c. And it is like the Case of Convictions by Justices of Peace; and in both Cases I hold, the Party has a good Remedy by *Certiorari*; and that is a Consequence necessary on all such particular Jurisdictions, that the Record of their Proceeding may be brought up hither, that this Court may examine whether they have kept themselves within their Jurisdiction. 3 Cr. 489. *Long's Case*; He was found guilty of Felony, and burnt in the Hand; and held Writ of Error could not lie, because no Judgment of Attainder, but that it might be removed by *Certiorari*; and so it was; and, for Faults in the Conviction, quashed, and the Party restored to his Goods and Chattels.

We do take it, that where a Court in its Nature is a Court of Record, a *Certiorari* will lie to it, by Reason of the great Superiority of this Court; which may command them to send their Proceedings before them up hither, that it may be seen whether they confine themselves to their Jurisdiction; which if they exceed, this Court may correct them; and how comes it to be granted upon Convictions by Justices of Peace, or Orders of Commissioners of Sewers? I remember formerly the Commissioners of Sewers were advised by Counsel not to obey *Certiorari's*, but they were all laid by the Heels for following such Advice, and obliged to obtain the King's Pardon for the Offence. And Mr. *Callice*, upon his Reading upon the Statute, holds, that their Orders are removeable hither by *Certiorari*. Indeed we are so cautious often to deny it, lest in the mean Time the Country should be overflowed: But the general Reason of the Law is, that wherever a Jurisdiction is set up by Act of Parliament to make Convictions, &c. *Certiorari* will lie to remove them; as in case of forcible Entries. And the Court is to examine, as far as appears on Record, that they have not exceeded their Authority; and if they have not, or not pursued the Act, to quash the Proceeding.

2dly, Suppose there were no Remedy, it would not follow from thence that these Proceedings are traversable, because the Act has given them a Power, and has given the

Party

Party no Remedy; for the not giving an Appeal from them, or the Making their Judgments irreverfable, fhall not alter the Nature of a Court of Record. And if the Statute gives them too great a Power, who can help it? That there lies no Appeal is a Strengthening rather than a Weakening of their Authority. And this appears by many Authorities; as if a Verdict be given by a Jury in a Criminal Cause, or if in fuch a Cafe the Judge mifdirects the Jury, or tells them the Law is otherwife than it is; as that Killing a Man in his own Defence is Murder, and the Jury fhould find it fo, there is no Remedy.

There has been an old Star-Chamber Law, that a Jury might in fuch Cafe be attainted; *vide* 12 Co. —. and a Judge has been brought into the Star-Chamber for making a falfe Return; but adjudged it could not be. And heretofore a Jury has been fined for giving a Verdict againft Evidence. 2 Leon. 233. Noy 48. Yelv. 23. Mo. 126. But fee *Vaugh.* 135. *Busbell's Cafe*; where it was held by all the Judges of *England*, except one, that a Jury could not be fined for giving a Verdict againft Evidence, becaufe they are Judges of the Fact; and therefore by the fame Reason the Defendants here, being Judges of the Matter, fhall not be liable to Action for their Judicial Act. 3 Cr. 309. In a Civil Action, the Judge directs the Jury that the Law is otherwife than it is; and they find according to Directions, yet Attaint lies not: Yet there the Parties were without Remedy; therefore it would not follow in our Cafe, becaufe there is no other Remedy, therefore the Matter is traverfable; and that either in Civil or Criminal Matter. And tho' the Plaintiffs have no Jury here, yet that makes no Alteration; for if they have Power to convict, fine and imprifon by the Statute, they are Judges of the Matter. 7 H. 6. 13. there is a Diverfity between a Fine and an Amerciament; if Fine be impofed, it is not traverfable, but Amerciament is; no Action will lie againft a Bailiff for awarding a Procefs upon a Prefentment; what then remains in this Cafe? For if, as long as a Verdict of a Jury ftands, it cannot be traverfed; why when the fame Authority which the Jury had is vefted in a Judge by Act of Parliament, why, I fay, fhall it be traverfable; and can any Man give a Reason of a Diverfity between the Cafes. For if the Parliament has given the Cenfors the Power of a Jury, they muft give the Confequences of that Power. And the Cafe of *Hammond* and *Howel*, in this Court, 29 Ca. 2. is as full as can be in Point; an Indictment was found againft fome Perfons for going to Conven-

Jury cannot
be fined for
Verdict a-
gainft Evi-
dence.

Vide 3 Inf.
63. If Eccle-
fiastical Com-
millioner com-
mit a Man a-
gainft Law,
Action will lie
againft him.

Fine and A-
merciament
different.

Action
brought a-
gainst a Judge
of Oyer and
Terminer,
would not lie.

Postea Trin.
12 W. 3.
Rook v. She-
riff of Salis-
bury.

Action against
Commissioners
of Excise, for
making one
pay Duty for
Strong Wa-
ters for what
was not, laid,
because ex-
ceeded their
Duty.
Postea Trin.
12 W. 3.
Dom' R. v.
Inhabitants de
Glamorgan-
shire.

Conventicles, and the Jury would not find them guilty upon Evidence; whereupon they were fined and committed; and upon a *Habeas Corpus* to the Common Pleas, it was resolved the Jury could not be fined for not going according to Evidence, and they were discharged. And then they brought an Action of false Imprisonment against *Howell*, who pleaded, that he was a Judge of Oyer and Terminer, &c. and held no Action would lie, because it did appear he was a Judge of Record; tho' it was plain, by the Opinion of the Court of Common Pleas, he could not fine them by Law; yet for this very Reason Judgment was given for the Defendant; and where is the Diversity between that Case and ours? They were both Judges of Record, both had Power to fine and commit; and shall the one be punished, and not the other, tho' they act against Law? And as I have said before, the Censors have Power over the Plaintiff's Person, and why shall not Judges, created by Act of Parliament, have the same Protection as any other Judges whatsoever. I might have enlarged much more upon this Head, but fear I have been too long already; and perhaps I may be sorry to have Occasion to say so much, for some may abuse it.

Obj. 5. Hard. 480. Trespass was brought against the Commissioners of Excise, who convicted one for not paying Duties for Strong Waters; and the Jury found, that the Liquor was Low Waters from which the Spirits were extracted, and it was held the Action did lie; and what was the Reason? Because they exceeded their Duty; for their Authority only extended to take Excise of excisable Liquors; but here the College have a Jurisdiction over the Person. And in case a Justice of Peace convicts one for having a Bastard Child; if so be the Child be a Bastard, he is concluded, but if it be not, it is not his calling him one will make him so; and therefore the Party is not without Remedy, for all was *coram non Judice*; so it is not the Commissioners of Excise's calling Low Waters Spirits, will make them so: And this is the Reason of that Judgment; for if it were admitted that they had Jurisdiction, there would be no Remedy.

2dly, And suppose it were traversable, it is certainly enough alledged here, so that Issue may be taken upon it; for it is said, he took upon himself to administer Physick to the Woman, and he gave her very hurtful and unwholesome Physick, whereby she became worse and worse, and incurable.

Obj. 1. It does not appear what Sort of Physick it was. And what then? If they had mentioned it, would we be any Thing the wiser for it? for we must try it at last by a Jury, and take the Opinion of Physicians in it; and if Action be brought against a Physician, or against a Surgeon, it will be enough to say, that he unskilfully and inartificially did apply his Cure; and the rest may come in Evidence.

Obj. 2. Not said what Disease she had. Suppose she had none at all, that would make the Matter worse.

Obj. 3. It does not appear the Witnesses were sworn. I shall answer, *1st*, It may be a Question, whether they ought to be sworn; and it seems to me, they may tender an Oath, as a necessary Consequence of their Judicial Power; but I will give no positive Opinion. *2dly*, Suppose they could administer an Oath, and will not do it, or *vice versa*, it would only make their Proceedings erroneous, and then ought not to be arraigned for it.

And tho' the Plaintiff be not one of the College, yet, if he practise Physick within their Jurisdiction, he ought to subject himself to the Law, as well as any other. *Et Jud' pro Def'.*

Per Holt: It seems Censors may tender Oath, in Consequence of their Jurisdiction.

Tho' Practitioner be not a Physician, Practising makes him liable.

Dominus Rex versus Somerton.

AN Order of Adjudication of the reputed Father of a Bastard was ruled bad for two Faults. *1st*, It did not appear that one of them was of the *Quorum*. *2dly*, Nor that the Examination was by them both; and either held fatal; but because the Defendant was not present in Court, as he ought to be, it was only quashed, *nisi*.

Judgment was upon the Return of two *Nihils* to a *Sci' fac'*, reciting a Judgment in the King's Time, when in Truth it was a Judgment of the Time of King and Queen, and so no Judgment to warrant *Sci' fac'*, and Money levied by Virtue of this Judgment. *Per Curiam:* In Strictness the Defendant ought to be put to his *Audita querela*; but we do often give Relief upon Motion; and the Judgment on *Sci' fa'* was set aside, and Restitution awarded.

Judgment on a *Scire fac'*.
Ante p. 351.

— versus *Cutts*.

Clerk of Corporation ordered to attend with the Charter.
 Postea Trin.
 12 W. 3.
 Lacy v. Kynaston.

A Trial at Bar was to be concerning the Right of Members of a Corporation; and it was moved on one Side, that the Town-Clerk should attend with the Corporation-Charter. *Per Cur'*: Of Right you are not intitled to that, because you may have a Copy of it at the Rolls; but it being meerly to try the Right, it was thought hard to put them to the Charge; and the Clerk was ordered to attend at the Charge of them that made the Motion. If Tenant claim by Copy, the Lord on Motion is only ordered to let him have Sight of the Court-Rolls, but not to bring them into Court. *Per Cur'*.

Freeman versus Bluet.

Salk. 409.
 An immediate Officer of a Court cannot justify under a returnable Process without shewing a Return; *aliter* of those who act under him.

T Respafs for entring into Plaintiff's House, and taking away such and such his Goods. Defendant Pleads, That *London* is an ancient City, &c. and that Time out of Mind there was a Court of Record there *tent' coram alterutro* of the Sheriffs, which had a Jurisdiction of all Trespases, Replevins, &c. arising within the City; that before the Time mentioned in Declaration, *viz.* such a Day, &c. *A.* came to the said Court, &c. and there before the Sheriff levied a Plaint in a Plea of taking and detaining Goods, against Plaintiff, and found Security to prosecute it, and redeliver the Goods, if Judgment should go against him; that *superinde* the Sheriff *ad tunc et ibidem* did issue a Precept to the Defendant, one of the Serjeants at Mace to the said Court, commanding him to replevy the said Goods, and make a Return to the said Precept; that he accordingly did replevy them, &c. and delivered them to *A. quæ est eadem transgress'*, &c. To which Plea the Plaintiff demurrs.

And for the Demurrer it was argued the Plea was naught, for Want of a Return according to the Command of the Precept; for whoever justifies by a Writ or Precept, must shew his Compliance with all it commands, without which he cannot take Advantage of it. 20 H. 7. 13. If Officer take Goods of an outlaw'd Person, and make no Return, the Party upon Reversal of the Outlawry shall have Trespafs against him for his Goods; 21 H. 7. 22. for he was to have done two Things, one for the Advantage of Plaintiff,

tiff, and the other for that of Defendant; and he shall not justify the one without the other. And here the Plaintiff ought to have the Advantage of the Return, which the Defendant deprives him of by making none. It is true in an Escape the Defendant shall not take Advantage of the Want of a Return, because his own Wrong. And one that acts under the Officer in this Case shall justify without a Return, because it was not in his Power to make one; but here it is the Officer himself, who could, and ought to make a Return, that would justify without it: And an Escape would lie against this Serjeant upon Execution of a Process of that Court; but if it were upon the Execution of a *Latitat*, or other Process out of the Courts of *Westminster*, it would not lie against him, but against the Sheriff. 1 Ro. Ab. 806.

Then there is no such Court as they have set forth, for they say it is a Court held *coram alterutro* of the Sheriffs; and the Truth is, they have two distinct Courts, and one of them cannot act in the Court of the other; but as to the Courts of *Westminster* they both make but one Officer. *Trin. 2 W. & M.* Escape lay against them both for an Escape out of the *Counter*, of which they both make but one Keeper. And their being Judges does not hinder their being Keeper too; as the Mayors of many Corporations are both. *Ray. 83.*

Vide ante
127. acc.

Dee contra: Serjeant is but an Under-Officer, and such is not liable to Action for what he does by Warrant of a Court. 11 H. 4. 58. Debt was upon a Judgment, and pleaded that the Plaintiff sued out a *Fi. fa.* upon that Judgment, and the Money was levied by Virtue thereof, and paid to Plaintiff; and there it was said at the Bar, that it was no Plea, without shewing a Return, because the Judgment being Matter of Record ought not to be avoided but by Matter of as high a Nature; but Court gave no Opinion. *Vide 4 Ed. 3. 8.* That Sheriff is not excusable by Virtue of a *Fi. Fa.* without a Return, for that commands him to have the Money in Court; but he may justify by Virtue of an *Elegit* without a Return: *Quod Holt negavit.*

The Party has no Injury done him for Want of a Return; for if the Plaintiff in the Replevin discontinues, he has his Goods again: And for Precedents of Justification in Replevin without a Return, he cited the *Old Ent. 136, 159, 163. Raft. 688. 669. Co. Ent. 333.* and he put this Diversity, that where the Command of the Writ is to deliver to the Party that sues it, there needs no Return; otherwise where

where it is to have it in Court; and the Sheriff without a *Venditioni exponas* may sell upon a *Fi. fa.*

Holt: 'Till Process return'd, the Escape of a Prisoner in that Court would lie against the Serjeant, but after Return it lies against the Sheriff. And as to the Objection, that Court is laid to be held *coram alterutro*, that may be well, and taken severally, and I believe originally they were one joint Court, but sever'd by Partition, and the Hustings in Truth is the County Court of the City; and wherever the Sheriff justifies by Virtue of a mean Process, he ought to shew a Return. There is a Diversity in the Case of *H. 7.* before put; when the Sheriff is by the Writ commanded to have the Party in Court, there he ought to make a Return, but he need not do it in Judicial Process, for then he is only to keep him till he makes Satisfaction.

And *per totam Cur'* in *Hill.* Term following: The Plea is clearly bad, for Want of shewing a Return, for the Precept is returnable, and commands a Return; and in all *Capias's ad Respondend'*, or other mean Process to Sheriff, if Trespas or false Imprisonment be brought against him for executing them, he cannot justify without shewing a Return; and the Diversity is between the immediate Officer of a Court to whom the Writ or Mandate is directed, and one that acts under him; for if he be no Officer of the Court, but acts under him, he may justify without shewing a Return; otherwise of Sheriff or other immediate Officer; for he, that has not shewed to the Court that he has done his Duty in what the Process of the Court required him, shall not be justified by the Process. *Vide 38 H. 6.*—and many other Books. And the Case of Replevin is much stronger; for where a Plea is levied in Replevin, there is a Precept made thereupon to replevy the Goods; and if they be replevied, what shall the Defendant do if there be not a Return? It is true he has a Day on the Roll to appear, and perhaps demand the Plaintiff; yet if he do not appear on the Return of the Precept, whether the Replevin be good or not, the Court cannot know what Judgment or Process to award; whereas if Return be made, and a Particular of the Goods given, and the Defendant comes and makes Title, he shall demand the Plaintiff, and have Judgment *de returno habendo*; but if the Replevin be adjudged good, the Plaintiff shall have Judgment and Costs; or if the Return be an *Elongat'*, the Court shall award a *Withernam*; or if the Party be nonsuit, there shall likewise be a *Returno habend'*. If the Replevin

2 Cro, 446,

447.

1 Jo. 378.

379.

Immediate
Officer cannot
justify under a
returnable
Process, with-
out shewing
Return; *aliter*
of one who
acts under
him.

Postea Mich.

12 W. 3.

Moorw. Wats.

plevin be executed and justifiable, Judgment shall be for Plaintiff; and in order to these Things there must be a Return.

The first Replevin and *Alias* indeed are not returnable, but are Warrants to the Sheriff to replevy, and in Nature of a *Justicies*; and therefore one may justify by Virtue of them without a Return. But the *Pluries* is returnable, and therefore, if the Sheriff will justify by it, he ought to return; otherwise one should have no Means to have his Goods again; and all the Cases that seem against this are of inferior Officers: *Et sic per Cur' Jud' pro Quer'*. And in Case of original Replevin to Sheriffs, which is not returnable, but a *Justicies*, the Sheriff's Precept to his Bailiff to summon in the Defendant is returnable, and gives them Day in Court.

Replevin and *Alias* is not returnable, but the *Pluries* is.

— versus *Farrell*.

Broderick moved, That the Defendant in Trover after Declaration might bring the Thing itself and deliver it to the Plaintiff. And Gould, J. said he had known it often done; otherwise where he would tender the Value, for Defendant shall not set a Value upon the Plaintiff's Goods; and Motion was granted.

In Trover may bring the Thing itself and deliver it to the Plaintiff. Ante p. 90, 95, 187, 188, 241.

Per Holt: If a Pension be by Prescription out of a Rectory impropriate, tho' the Rectory come into Lay Hands, yet it may be sued in the Spiritual Court, because it might have commenced by a Spiritual Act; and if such a Prescription be denied, it shall be tried there; but if a *Modus decimandi* be pleaded, it shall be tried at Common Law; and if it be not found, a Consultation shall go.

Ante p. 260. 326. Postea Trin. 12 W. 3. Stone v. Jones. Mich. 12 W. 3. Johnson v. Ryson.

Per Eundem: If Distress for Damage feasant die in Pound or Escape, the Party shall not retake them; but if it were for Rent, in either Case he may distrain *de novo*; and Escape of Cattle out of Pound is not like Escape of Prisoner out of Gaol; for if Pound be not good, the Distrainant may be his own Keeper, and put them in his own Pound, but he cannot be Keeper of his Prisoner; and every Pound-Keeper is the Servant of him who impounds the Cattle, *pro hac vice*.

If Distress for Rent escapes or dies, Distress may be *de novo*; aliter if for Damage feasant.

Attorney
should not take
a Warrant of
Attorney to
confess Judg-
ment without
a Defeasance.

Per Eundem: It is a great Misdemeanor in an Attorney to take a Warrant of Attorney to enter Judgment on a Bond without a Defeasance; and none but a sworn Attorney can take such a Warrant.

King versus Inhab' de Kirford.

Order to re-
move a Man,
and his Fa-
mily, ill.

AN Order of two Justices was to remove a Man, with his Wife and Family, and quash'd *in toto*, because the Family might have another Settlement; so it would be if Order were to remove him and Children.

Information
for making a
Wharf contra-
ry to a private
Act of Par-
liament.

An Act of Parliament was for making a River in *Darbyshire* navigable, and that none should build any Wharfs upon it from henceforth; and one having after built a Wharf, another, who had a former, and Prejudice in the Advantage thereof by the second Wharf, moved for Leave to file an Information against him upon the Statute; and tho' Court said it was not an Act of so publick a Nature, as that Court ought, *ex officio*, to take Notice of it; yet because it was for publick Good, and the Matter directly against it, they gave Leave to file an Information; but held an Information would not lie for the Violation of a private Statute. *Note*; At Common Law Informations might be filed without Motion, in the Name of the Master of the Crown-Office; but since the Statute of 4 & 5 W. & M. c. 18. it cannot be without Leave of the Court; and that to avoid frivolous and vexatious Matters; and that the Party in Case of Acquittal, or Nonsuit, have Costs.

4 & 5 W. &
M. c. 18.

Badger versus Floid.

Person who
has Judgment
in Ejectment
may bring
Debt for Rent
notwithstand-
ing Writ of
Error pend-
ing.

THE Plaintiff had Judgment in Ejectment, of which Error being brought, and Bail given to prosecute, and answer the mean Profits, and pending it, the Plaintiff brought Debt for Rent. And *per Cur'*, the Writ of Error does not hinder the Plaintiff from bringing Debt, or distraining for his Rent; and here he might have entred without a Writ of Execution, and only all Executions by Writ are suspended by the Writ of Error: And in a real Action, after Judgment, the Plaintiff may enter notwithstanding Writ of Error, if his Entry were lawful without the Judgment; for that is not by Force of the Judgment, which shall not put him in

in a worse Condition than he was in before. And whereas it was urged, that in the *Exchequer* they had laid a Plaintiff by the Heels for such a Thing, *Holt* said it must have been by Virtue of their equitable Power, which this Court had not.

Per Holt: If *A.* covenant with *B.* to convey him all his Right and Title to the Manor of *D.* to which *A.* has no Right; it is not a good Plea in an Action of Covenant, that he had no Right, &c. but he must make such a Conveyance, as would in Truth pass all his Title, in case he had any; and he is estopp'd by his Covenant to say he had no Title.

Covenant to convey all his Right; no Plea to say had none.
Vide 1 Saund. 216.
Postea Mich. 12 W. 3.
Hammond v. Ouden.

In a Case between Basse and Bellamont.

PER Holt: If the King grant a Tract of Land in the Plantations abroad to a Man, with a Legislative Power, which Grantee passes over to another; the Legislative Power shall not pass as a Privilege annexed to the Land, but that remains with the Person of Grantor.

Grant of Legislative Power not transferable.

Rosiere versus Sawkins.

*T*RESPASS by Master for Battery of the Servant, *per quod servitium, &c.* Defendant pleads *Actio non*, because it did not appear that he was his Servant at the Time of the Battery committed, concluding with a *Petit Judic' de Billa, et quod Billa cassetur*; and whether this were made a Plea in Abatement by the Conclusion, was the Question. *Per Holt*: We must discourage these Sort of Pleas, and *Billa* and *Nar'* are the same Thing in this Court; and therefore one may demand Judgment *de Billa*, and alledge Insufficiency in the Declaration; and tho' such a Plea as this ought not to be received, yet since it has been received, there is no Harm to award a *Respondeas ouster*, for Defendant cannot assign it for Error, because for his Advantage; and yet we may justify to give final Judgment: And so was the Rule.

Billa and *Nar'* ratio are the same in B. R.

5 Co. 39. b.
8 Co. 59. a.
Owen 33.
7 Co. 4.
2 Saund. 46.
47.
Dy. 38.

Local Action not to be laid any where but where it did arise, without Consent of Parties. *Per Cur'*.

Local Action to be laid where arose.

Lady

Lady Faulkland versus Stanion.

Debt on a
Bond.

IN Debt upon a Bond, it was pleaded in Bar, That in a Former Action upon that Bond the Defendant had pleaded the late Statute of the King laying Taxes upon Bonds for Security of Money, and that none should recover such Debts if they had not taxed the same; and that upon that Plea the Plaintiff was barr'd. And it was objected, That Statute was only a Temporary Law, and now expired; and therefore the Impediment being removed, the Plaintiff should recover; and compared it to the Case of Excommungement pleaded, where the Judgment is *Remaneat loquela sine Die quousque*, &c. which is but a temporary Plea, by which the Parties are put out of Court, but may be brought in by a Re-summons or Re-attachment; but where Outlawry is pleaded in Abatement after Pardon or Reversal thereof, Party must begin *de novo*. But *per Holt*: Here the Defendant had a good Plea when the first Action commenced, and Time shall not wear it out; and he said, that *Co. Lit.* 128. b. and 135. b. is to be understood upon this Diversity, when the Cause of Actions accrues to Plaintiff at a Time at which he is under the Disability of an Outlawry; there the Plea of Outlawry in Abatement shall quite overthrow the Writ, and after Removal thereof he must begin *de novo*; but where the Disability of Outlawry comes after the Cause of Action accrued, there the Plea of Outlawry is only a temporary Disability, which does not abate the Writ, but is only *quousque*; and after Removal thereof, he may re-continue the Action by Re-summons, &c.

Outlawry.
If Outlawry
is before Cause
of Action,
Plea of Out-
lawry destroys
the Action;
if Outlawry
is after the
Action acru-
ed, it is only
temporary,
quousque.

Steer versus Shalecroft.

Covenant to
convey at
Charge of Co-
venantee, he
must tender
the Charge.

IT was Covenant for not conveying an Estate pursuant to Articles. And *per Holt*: There is a manifest Difference between a Covenant to make a Conveyance at Charge of Covenantee, and a Covenant to convey to Covenantee, and he covenants to be at the Charge of it; for in the first Case Covenantor is not obliged to perform till Tender of the Charges; but in the second he is to convey at his Peril; and if Covenantee will not pay, he has his Remedy against him upon his Covenant; but where Covenant is to make Conveyance at Charge of Covenantee, Covenantor ought to give

give Notice to Covenantor, what Sort of Conveyance he intends to make, that Covenantor may judge what Charge to tender. 2^{dly}, When one pleads a Deed, he must plead it according to its legal Operation, and not according to the Words thereof. 3^{dly}. If Covenant be to make a Feoffment, &c. before such a Day, Covenantor ought to give Notice when he will make it, that Covenantor may be there to receive it; *Secus*, if it be to make a Feoffment on a Day certain; but in that Case Covenantor must plead a Tender on the last convenient Time of that Day.

Per Cur': All Controversies concerning Seats in a Church are determinable before the Ordinary, except where one claims a Seat by Prescription.

Seats in Church determinable before Ordinary, if no Prescription.

Dominus Rex versus Vill de Abingdon.

P*ER Holt*: The Reason why a Return to a *Mandamus* requires the utmost Certainty the Law allows of, is not only that the Party may have sufficient to ground his Action upon, if false; but to the End the Court might know what Judgment to give upon it, in case it were demurred upon, and because it cannot be helped by pleading.

Return to a *Mandamus* requires the greatest Certainty.

Bishop of Bath versus Bridges.

IT was moved to change the Venue in an Action of *Scandalum magnatum*; but it was denied; for *per Cur'*, it is never granted but for extraordinary Cause, as was that of my Lord *Shaftsbury*.

Vide ante 121. Postea Pasch. 13 W. 3. Dom. Rex v. Lee. Venue not changed on

Scandalum magnatum, unless for extraordinary Cause.

Per Holt: If upon a general Release, Releasee give Release for a Bill of Exchange, Note, &c. bearing even Date with the Release, the Release shall not discharge them.

Release does not discharge Note given the same Day.

D E

Term. Sanct. Trin.

Anno 12 W. III. in B. R.

Alderman
may surrender
by Parol.

IN Sir *Jonathan Fenning's* Case, it was held *per Cur.* that an Alderman might surrender his Office by Parol; for since he may acquire that Office without Deed, *viz.* by Election, *ex natura rei* he may surrender it without Deed; for whatever may be acquired without Deed may be surrendered without it. 1 *Inst.* 338. a. And it is incident to all Corporations to be able to receive such Surrender: And this Judgment was upon Return of a *Mandamus*. *Mulso* moved for a new Writ in order to bring Surrender or not in Question, the first Writ being quash'd as ill directed; and obtained it with Difficulty to try the Right.

Grabborn and Railer.

Warrant of
Attorney to
confess Judgment amended
long after.

Warrant of Attorney was for confessing Judgment as Executor; and being entred generally several Terms ago, it was now amended according to the Warrant.

Dom. Rex versus Inhab' de Marleborough.

Servant got
with Child not
removable on
that Account.

C*ertiorari* was to the Justices at Sessions to send up what Orders they had before them; and hereupon an Order of two Justices for the Removal of a Servant Maid, who was got with Child within the Year in her Service, was certified, without shewing how it came there. And *per Cur.* 1st, The Order is well removed; for when two Justices make an Order, it is very proper for them to certify it to the Sessions, and when they do so, the Sessions are legally possessed of

of it, and it may be well removed from thence hither. 2dly. If one hires a Maid for a Year, and before the Year's End she is got with Child, she shall not for that be removed, but shall serve out her Time; there shall be a Year's continual Service to make a legal Settlement for the charging of a Parish; but till Year be out none shall disturb the Party from serving. And since she is not removeable within the Year, if she leave her Master without his Consent, she may be sent back to her Service; but then it is to serve her Time, but not a Charge to Parish.

Per Holt: Upon Complaint made to one Justice, of one's being likely to become chargeable to a Parish, they both may examine and order jointly; but they both must join in the Examination and Order, and one must not pin his Faith upon the other's Sleeve. Ante. p. 393.
Both Justices
must examine.

Dom. Regina versus Inhab' de Glamorganshire.

AN Order of Sessions was for assessing the Inhabitants for the Repair of a Bridge in that County, pursuant to the Act of 23 *El.* which was said to be a private Law, and therefore the Order being removed up by *Certiorari*, it was moved they should not be filed, for that, as it was said, a *Certiorari* did not lie, being a private Law; and for this was quoted 1 *Sid.* 296. 1 *Keb.* 818. 2 *Keb.* 43, 88, 90. But *per Cur'*: Wherever there is a particular Jurisdiction set up by Act of Parliament, this Court may command the Execution thereof by *Mandamus*, and remove their Proceedings hither by *Certiorari*, to see whether they have observed their Authority. Indeed we do not easily grant a *Certiorari* in Case of Commissioners of Sewers, for the Danger that may befall the Country in the Interim; yet if good Reason appears, they will grant it; and the Reason of 1 *Sid.* 296. is not because it was a Private Act of Parliament. And *Gould* remembred a Case where *Certiorari* was denied to remove Orders of Commissioners of Sewers upon this Reason; if the Order was wrong, the Party grieved had his Action; if it was right, it ought not to be stopp'd or delay'd; and that was the Reason that it has been sometimes denied in Case of Order of Justices upon an Authority by a Private Act of Parliament. To which *Holt* answered, If they meddle with a Thing out of their Jurisdiction, you say well; otherwise it is when they have Conusance of the Subject Matter, but do S. C. 1. *alk.* 140.
1. *L. Kaym.* 500.
2. *Id.* 20.
Order of Sessions for assessing to repair a Bridge pursuant to a private Act of Parliament, removed by *Certiorari*.
Ante p. 390.
Vide Hard.
480.
Ante p. 392.

do not pursue their Authority. And we often stay the Filing of such Order, to the Intent, that if it be not well removed, to grant a *Procedendo*; but if it appear well removed and faulty, we file and quash it. And *per ipsum*, There may be a Diversity between a private Act concerning one single Person, and an Act concerning the Inhabitants of a whole County; and it was ruled they should make a Return, and recite the Statute in it. *Note*; This was before the Judgment in the Case of Dr. Grenville and College of Physicians, *ante* 386, &c.

Heir by Bond is only chargeable as Tertenant.

Per Holt: If one bind himself and his Heirs, the Heir's Lands are chargeable as he is Tertenant, and not as Heir.

Per Holt: Voluntary Appearance, and on *Cepi Corpus*, the same.

Per eundem: By the antient Rule of Court there could not be a voluntary Appearance, without a Writ were taken out; but even now there must be a Writ taken out before or after; for without a Writ the Parties have no Day in Court, without which they cannot appear; and he sees no Difference between a voluntary Appearance, and one upon a *Cepi Corpus*: For sure the Plaintiff ought not to be put in a worse Condition for his Kindness in not arresting the Defendant. If a Writ be returnable *Craft animar*, and a voluntary Appearance to it, it will be the same as if it were upon a *Cepi Corpus*.

Stone versus Jones.

Libel by Vicar for a Duty claimed by Prescription, for finding a Person to officiate at a Chapel of Ease.

Ante p. 260, 397.
Postea Mich. 12 W. 3.
Johnson v. Ryson.

Libel was in the Spiritual Court, setting forth a Prescription, for the Vicar of the Parish of *Marcham* to find a Person to officiate in the Chapel of *Garworth*, an ancient Chapel within the said Parish, for the Ease of the Parishioners; in Consideration whereof the Parishioners, Time, &c. paid him and Predecessors two Quarters of Wheat, and two of Malt, yearly. Upon Suggestion of no such Prescription, Prohibition was moved for. And it was agreed by all, that the Thing's being by Prescription, which properly is triable at Common Law, did not always suffice to oust the Spiritual Court of Jurisdiction; as if a Pension be by Prescription, tho' one may bring Annuity for it at Common Law, yet they may libel for it in the Spiritual Court, upon the Prescription; as *F. N. B.* 51. But it was urged for the Prohibition, 1st, That of common Right the Vicar is not bound to officiate out of the Parish Church, and therefore

not

not to be without Prescription. 2dly, It does not require the Vicar to officiate there himself, but to find one to do it, which he cannot be obliged to of common Right; and the Being of a Prescription is traversed, and ought to be tried at Common Law.

Holt C. J. It is the very Point adjudged in *William's Case*, 5 Co. 72. for it is an Ecclesiastical Duty to be performed for the Advantage of the Parishioners; and tho' it commences by Prescription, yet it concerns Ecclesiastical Persons, and is a meer Spiritual Thing; and is not at all the same as if it were against a Layman, who is not so easily bound by Canon Law as Ecclesiastical Persons are; for their Proceedings there by Prescription shall not charge a Layman, or any temporal Right. In Vacation, Patron and Ordinary may grant a Pension, and Parson shall be sued there for it; and upon the Statute of *Circumspecte agatis* a Prohibition was never granted in that Case; tho' Co. in his Comment upon that Statute, be of a contrary Opinion. *Et adjorn'*

Barton versus Bartlet.

FOUR Persons were arrested upon one Writ, and put *Non prof.* in Bail severally; one of them nonprossed the Plaintiff for Want of a Declaration. *Per Holt*: Till they are sever'd by Declaration the Writ shall be intended joint; and the *Non prof.* before Declaration must be upon the Writ, which is joint; and therefore one *Non prof.* will do for all, notwithstanding the several Bail.

Clay versus Snelgrave.

Libel was by Administrator of Master against a Ship for his own and Seamens Wages; and a Prohibition moved for, upon Suggestion that the Contract was on Land. It was agreed by all the Suggestion was naught, in case of Suit for Seamens Wages only; but the Doubt was as to Master. And *Northey* affirmed that *Powell*, one of the Justices of the Common Pleas, inform'd him they made no Difference in C. B. and quoted a Case *Hill. 27 Car. 2.* where the Court were divided in the Point; and he would make a Difference between a Contract by Land with the Master by Charter-party, and by Parol; for in the first he owned

Salk. 33.
Suit may be
in the Admiralty for Seamens Wages, but not for the Master's.
1 Vent. 146.
343.
Ray. 3.

a Prohibition should go; but not in the second Case; and one of the Reasons why Prohibitions should not go in case of Suit for Seamen's Wages is, because by the Civil Law they may sue the Ship; and that Reason holds with us; for the Ship is as much liable for the Master's as for the Men's Wages. *Contra* were cited 12 Co. 78, 80. *Hob.* 212. that if the Contract be by Land, and Duty accrue at Sea, or *vice versa*, a Prohibition shall go.

Holt: It is by Indulgence that Seamen may sue for their Wages in the Admiralty, but that was never extended to Masters, but once in my Lord *Herbert's* Time; for the Master's Case differs with that of Mariners, for he is a principal Servant, and he contracts with the Part-owners, and the Mariners with him; and a Prohibition is a Matter of Right, with some Restrictions; and that which is the Ground of Prohibition in these Cases, is the Contract being on Land; but that does not hold in all Cases; for in *Crosby* and *Lossell's* Case, Money was taken up at Land for the Use of a Ship distressed in her Voyage; and a Consultation was granted; otherwise if it were taken up before Voyage begun. And in case of local Jurisdiction, as that of the Admiralty is, there is no Difference between the Contract's being by Deed and by Parol; and it is hard to grant a Consultation upon Prohibition granted on Demurrer. *Gould acc' in omnibus.*

Postea Mich.
12 W. 3. Ro-
fiere v. Saw-
kins.
Hill. 12 & 13
W. 3. Grant
v. Bailey.
Money taken
up for the Use
of the Ship be-
fore begun the
Voyage, not
suable in the
Admiralty;
aliter if after.
Ante p. 38.
contra.
Vide 3 Lev.
60. *acc'.*

King versus Woolaston.

Ante p. 86.
Postea Trin.
13 W. 3. May
v. King.
Bond a Dis-
charge of *Assumpsit*.
DE B T upon several *Assumpsits*, Defendant pleads, that he had given a Bond for the same; and on Demurrer Judgment for Defendant.

The King versus Harris.

Cottages not
to be suppres-
sed by Indict-
ment.
AN Order of Sessions for suppressing a Cottage upon 31 *El. c. 7.* was quashed; for that Cottages are not to be suppressed by Indictment.

Per Holt: If one be bound to save harmless against a particular Thing, the Defendant ought to shew *coment* he has done it; but if it be to save harmless generally, a *Non damnificatus* generally will do; and if it be to save harmless in several Particulars, against all Persons, it is general.

Per eundem: We cannot take Notice of a Judgment upon the Custom of foreign Attachment in *London*, without the Custom be specially shewn.

In foreign Attachment Custom must be set forth.

Per eundem: If there be an ill Plea, and the Replication assign an ill Breach, Plaintiff shall have no Judgment. *Vide* 8 Co. Dr. *Bonham's Case*.

Breach ill assigned.

Parish of Erith versus that of Orford.

Order of Sessions was, whereas we are informed by the Church-wardens, &c. quashed.

Order made by Information, ill.

Dillon versus Walcot.

WRIT of Error of a Judgment given in the *K. B.* in *Ireland*. *Walcot's* Ancestor having been attainted of High Treason in *Ireland*, and his Estate granted by Letters Patent by King *Ch. 2.* to the Earl of *Roscommon*; the Judgment was reversed by Writ of Error in *K. B.* in *England*, and that Reversal affirmed before the Lords; and thereupon a *Mandate* to the Court of *K. B.* in *Ireland* to award Restitution; which they did, without any *Sci' fa'* against the Tertenant; whereupon *Dillon* brought this Writ of Error, setting forth the Attainder, and a Grant to the Earl of *R.* and that the Plaintiff was Assignee of the said *R.* and that the Award of Restitution, *ad damnum*, &c. The Want of *Sci' fa'* against Tertenants assigned for Error, and *in nullo est Erratum* pleaded. *Per Cur'*: Here is an extravagant Error, for upon the Reversal the Judgment is, that the Party be restored to whatever he has lost, &c. but that must be known; and the Way is, to come and suggest he was seised of such and such Land, &c. and to take a *Sci' fa'* against the Tertenants, and they thereupon ought to be summoned, and may come and shew Cause against Restitution, as perhaps a Fine levied by the Heir, &c. or by Party himself; and it would be prudent in a Purchasor of an attainted Person's Estate to procure such a Fine; and this has been done by the Purchasors of *H. Martin's* Estate, while he lay condemn'd in the Tower.

On Reversal of Judgment, and Award of Restitution, *Scire facias* should go to the Tertenants.

Sessions.

Indictment was taken at Sessions held such a Day by Adjournment, without shewing from what Time they had adjourn'd, and that Exception taken, but over-ruled.

If Attorney except against Bail, he must give Notice of it.

Davila versus Dalmanfer.

Mutual Debts
not to be set
one against
the other.

This now al-
tered by Act
of Parliament.

P*ER Cur'*: If there be two Dealers, and they reciprocally pay Money for one another, they shall have their reciprocal Action for it, in which either of them shall give special Bail; and neither of them shall give the Money paid by him in Mitigation of Damages, unless there be an Account stated; and they never can have an Account against one another.

Lord versus Francis.

Action for a
false Return is
local.

Ante p. 253.

P*ER Cur'*: An Action for a false Return is local, but may be laid in the County where it was made, or in that in which it appears on Record. And *per Holt*, if one be irregularly chose at first, and after he is owned by the Town, and entered into the Town-Book, or regularly chose into a Superior Dignity, I should take what followed to be such Evidence of a good Election, as ought not to be controverted.

Bill on a Gold-
smith, given
at the Time
of buying
Goods, good
Evidence of
being taken
in Payment;
aliter if given
after.

Ante p. 203,
241, 244.
Postea Pasch.
13 W. 3. Pell
v. Garlick.

Per Holt: If a Man contracts for Goods, and after carrying them away gives the Seller a Goldsmith's Note for the Money, it does not amount to a Payment; but if it were given at the very Time of the Contract, it would be *prima facie* Evidence that it was taken in Payment. And if a Man, upon a Contract made before, take such a Bill, and keeps it till the Party on whom it is drawn becomes insolvent, in an Action brought by him against the Buyer upon that Bill he shall be barred; but he shall recover the Debt upon the original Contract.

If Ship lost in
Return, Sea-
men shall have
all outward Wages,
and but Half while
in Harbour abroad.

Per eundem: If Ship goes Freight of an outward Voyage, the Seamen shall have their whole Wages out; but if at

all outward Wages, and but Half while in Harbour abroad. 1 Vent. 146. Postea Hill. 12 & 13 W. 3. West v. West.

their

their Return the Ship be taken, or other Mischief happen, whereby the Voyage homeward is lost, they shall have but Half Wages for the Time they were in Harbour abroad.

Per eundem: *A.* gives a Letter of Attorney to *B.* to receive Money for him from *C.* and after brings Action for the Money against *C.* who after pays the Money to *B.* the Attorney, it shall not abate the Action; because the Commencing the Action was a Revocation of the Letter of Attorney.

Action brought by Principal is a Revocation of Letter of Attorney.

The King versus Paroch' de Ragley.

Error of a Judgment upon an Indictment at the Quarter-Sessions for Non-repairing a Highway, between *A.* and *B.* in the Parish of *R.* and the Judgment was, that such a Sum *extrahatur & levetur* to repair the said Way, *nisi* it were repaired by such a Time. *Per Holt*: There are Statutes that direct the Certainty of Proceedings in these Cases; as that of 2. 3 *P. & M. c. 8.* and 13 *El. &c.* and they are empowered by Law to charge or fine, and that alone to be controlled by Traverse: By the Statute of *Ph. & M.* a Justice of Peace may present at Quarter-Sessions upon his own Knowledge; and the Justices there are to give as much Credit to it as if it were by Jury; and that is a publick Law. Parish of common Right ought to repair their Highway; but by Prescription one Parish may be bound to repair the Way in another Parish. And here it was excepted, that it did not appear in what Parish the Way was; for it was laid to be between *A.* and *B.* in Parish of *R.* so that *B.* only may be in *R.* Another was, that the Judgment was preposterous, *extrahatur & levetur*, instead of the natural Way of *levetur & extrahatur*; and for this Exception the Judgment was reversed; and compared to Debt upon Bond for 10*l.* if Judgment were *ideo consideratum est, quod habeat executionem de prad' 10. & recuperet.* *Per Cur'*: It would be Error.

Pet versus Pet.

P*ER Cur'*: The Words (*Brother and Sister*) and (*Collateral*), in the Statute of Distribution, ought in all Reason to refer to the Intestate, for Intestates are the Subject

Salk. 250. Statute of Distributions.

ject Matter ; and in this Court they would never hear Argument for Distribution before the Statute, but once, in Consideration to Sir *Francis Walcot*, who finding it would not do, procured this Statute to be made ; and the *Proviso* is, that there shall be no Distribution in Collaterals beyond Brothers and Sisters Children, and that must be Brothers and Sisters of the Intestate. It was upon Debate upon a Motion for a *Mandamus*.

Mandamus.

Per Holt : If an Officer make an ill Return, he shall be amerced, and we will not allow him to quash the ill Return and make another ; and if, upon Disallowance of one Return, he makes a second bad, an Attachment shall go.

Mitford versus Walcot.

Salk. 129.
Acceptance of
a Bill of Ex-
change is an
actual Promise
to pay.

Ante p. 211,
212.

A. Draws a Bill of Exchange at *Madrid* in *Spain* on *B.* at *Amsterdam*, payable at two Usances. *B.* after the two Usances, viz. the 4th Day, which was the last Day of Grace, accepts the Bill at *London*; and for Non-payment the Action is brought against him ; and the Declaration shew'd the Days of Drawing and Acceptance, by which this Fact appears. *Per Cur'*: 1st, An Acceptance is an actual Promise to pay : The Doubt then was upon the Variance of Days of Grace at *Amsterdam* and in *England*; for there they have eight and but four here ; and that, as it was urged by the Custom of Merchants, an Acceptance at *Amsterdam* after Time of Payment was void, and the Days of Grace are no Part of the Usance ; and the Acceptance here being to pay *juxta tenorem bill' prad'*, it must be understood the same as if it were at *Amsterdam*, for there it was directed and payable. But it was agreed here, that an Acceptance or Negotiation in *England*, after Bill becomes payable, shall bind the Acceptor or Indorser, tho' not perhaps the original Drawer. And for this was quoted *Pigot* and *Jackson's* Case in this Court, *Hill. 9 W. 3.* tho' it were an Acceptance to pay *juxta tenorem bill' prad'*, as here. 2dly, It was resolved a Usance is a Month at twenty-eight Days. 3dly, If Bill be accepted at *Amsterdam*, and no House named where the Payment is to be, the Party need not acquiesce to it, but may protest the Bill ; but if he will acquiesce, it is well enough. 4thly, If *A.* draws a Bill on *B.* who will not accept it, and *C.* offers to accept it for the Honour of the Drawer, the Drawee need not acquiesce, but may protest ; but if he does acquiesce, *C.*

is bound. 5thly, If Bill be drawn on one at *Amsterdam*, and he does not care to accept it, but gets one here to do it, Party need not acquiesce; but if he does, Party here is bound. *Et Jud' pro Quer', nisi.*

Rook versus Sheriff of Salisbury.

EXECUTOR owed 100*l.* by Judgment, and has Assets to pay it, and owes another Sum by Contract, for which he is sued, and suffers Judgment to go against him by Default; he pays the former Judgment, and *Fi' fac'* is brought against him upon the second; to which the Sheriff at first Dash returns a *Devastavit*; and this Action brought for a false Return. And it was agreed, that if a Ministerial Officer does act falsely in his Duty, to the Prejudice of another, an Action would lie for it. And here it was urged, the Sheriff had no more to do but to levy the Money *de bonis Testatoris*, if any he found, or else to return *Nulla bona*; and then the Plaintiff, upon Suggestion of a *Devastavit*, might have a *Sci' fac'* to inquire of a *Devastavit*; and if by Inquisition a *Devastavit* were found, to warn in the Executor to shew Cause why Judgment should not be *de bonis propriis*. And it was further urged, that there was no *Devastavit* in the Case; for the suffering Judgment by Default was no Confession of Assets; but the Judgment is conditional, if there be Assets in our Hands, to be levied of them, and the Sheriff has no Return to make, but that he levied Goods to the Value, &c. or that there are no Goods; and there is nothing in the Writ to warrant such a Return as here is: And suppose our suffering Judgment by Default, be a Confession of Assets, yet it is not a Confession of a *Devastavit*, which he, without Suggestion, as aforesaid, ought not to return.

Contra it was urged, that it was clear the Sheriff might well return a *Devastavit*, but at his Peril, if it were false. And a Judgment by Default is not an absolute Confession of Assets, but only a Confession of all the Assets he ever had; for if the Executor had administered them, he ought to shew it in Pleading; and if he does not, he is too late after Judgment by Default. If two Actions be against an Executor of the same Term, each of one Hundred Pounds, and he has Assets but for one, and pays it, and suffers Judgment by Default in the other, he shall pay it; and the Reason is, because, by not Pleading to the second Action, he

he confesses all the Assets he ever had, and cannot avoid it by Pleading; and if he had pleaded no Assets, and Judgment is against him, he shall not avoid it by *Audita querela*; because he had not an Opportunity of Pleading it.

Holt: A *Devastavit* is a very proper Return for the Sheriff to make; and upon such a Return Execution shall be *de bonis propriis*, and not a conditional one, and is never otherwise; and the Reason is, that when a *Fi' fa'* goes, it is *de bonis Testat'*; and if the Sheriff finds no Goods of Testator, and is satisfied of a *Devastavit*, he cannot execute the Writ of the Goods of the Executor, but ought to return the Truth, a *Devastavit*, and then he shall have Power to make Execution *de bonis propriis*. And when upon a *Plene administravit*, Assets *ad valentiam* are found, the Sheriff shall return a *Devastavit*, if he find not Assets, and Executor shall never avoid it; here there were Assets, but liable to a former Judgment, which he might have pleaded, but omitted; and how can he take Advantage of it now. If there be Judgment in Debt against Tenant in Tail, who dies seised, the Estate descends to the Issue; *Sci' fa'* is sued against the Heir and Tertenants; Issue is returned served, and Tertenant of Lands in Fee for Ancestor had both Lands in Fee and Tail, and Judgment by Default, and an *Elegit* of a Moiety of all; and then the Issue came to shew the Lands were intailed; but rejected, because he omitted to do it in his proper Time upon the *Sci' feci* returned. So it is in case of Judgment and Release, and *Sci' feci* returned, if he do not plead the Release before Judgment upon the *Sci' fa'*, he shall not have *Audita querela*. *Vide Hob. Hannor v. Mase*, 283. For when you have a good Matter in Bar, and an Opportunity to plead it, you shall not give it in Evidence. And tho' it be said, that the Judgment by Default was for Want of a Demurrer, yet that will not alter the Case. *Vide 5 Co. 32. & per luy*; If two Actions are brought against an Executor of 100*l.* each, and he has Assets only for one, and he pleads *Plene administ'* to both, and then pays off one, and suffers the other to go by Default, he shall answer *de bonis propriis* for it; and so if there were ten Actions, and he plead *Plene administravit* to all, and after pays off one, which is all he has, and then suffers Judgment to go by Default, he shall be charged with all the rest *de bonis propriis*; so that your Concession, that it amounted to a Confession of no more than he once had, was too liberal. And in *Hale's* Time, if Executor had pleaded several Judgments, and any of them were found

When there is
Matter in Bar
to be pleaded,
and omitted,
not to be given
in Evidence.

against him, he used to direct the Jury to find for Plaintiff generally; but that was a little hard; and here you are estopped to say Sheriff made a false Return, to charge him, when you might have pleaded it in Court. *Jud. pro. Def.*

Per Holt: By Law none can be compelled to find Surety for his good Behaviour, except it be by ancient Custom within a Leet, or for Vagrancy, or some certain Offence; and here one being committed thus, Whereas *A.* has been convicted of a Misdemeanor, and cannot find Security for his good Behaviour; therefore, &c. And here could be no *Certiorari*, there being no Record of the Conviction; the Party being brought up upon *Hab. Corp.* was discharged on Motion. *Per Cur.*

Good Behaviour.

Hill versus Wilks.

IT appearing to Court plainly, that *W.* had got *H.* outlaw'd when he was visible, and to his Knowledge easily might be served with Process; he was ordered to reverse it at his own Charges. *Vide Sir Tho. Jo. 211.*

Outlawry reversed at Plaintiff's Charge, where Defendant was visible.

King versus Sellinger.

HE was indicted for lying with another Man's Wife, and moved to quash it as a Matter not indictable; but *per Cur.*, we will not quash an Indictment for Matter of this Nature on Motion; but demur if you will.

Indictment for lying with another Man's Wife, not quash'd on Motion.

Levins versus Randall.

LEVINS, Treasurer of *Grays-Inn*, brought Debt against *Randall*, a Member of that Society, upon a Bond of forty Pounds, condition'd for Payment of Commons and other Duties of the House. Upon Conditions performed pleaded, it was replied that *Grays-Inn* is an ancient Society, &c. and that Time, &c. every Member thereof, at his being call'd to the Bar, should pay so much to Use of the House, and the necessary Averments made. 1st Exception to Replication was, That it was aver'd that it was not paid to the House, and it might be paid to the Treasurer; *sed non alloc.*; for Payment to Treasurer is Payment to House, as Payment to the Chamberlain of *London* is Payment to the

Bond for doing a Thing which lies in Demand, not forfeited till Demand.

City. 2dly, That this was in the Nature of a *Nomine pænæ*, and therefore not due till an actual Demand; which was not alledged. But *Holt*: Sure there is a Difference between a Bond and a *Nomine pænæ*. *Gould*: Where the Thing in its Nature requires a Demand, a Bond for doing thereof is not forfeited till Demand: And in that Case the Defendant must take Advantage of the Want of Demand, by pleading that he was always, and still is ready to pay it; for if he plead Performance generally, and Plaintiff assigns a Breach in his Replication, the Defendant shall not rejoin and alledge Want of Demand, for that would be a Departure; *quod Holt concessit. Vide 1 Cro. 76, 77.* 3dly, It was objected there could not be a Prescription for Payment of Shillings, which was a new Coin, for the old Coin were Marks; but no Heed was taken of it. And *Jud. pro Quer. nisi.*

3 Cro. 828.
Noy 16.
1 Saund. 117.
1 Vent. 36.
2 Saund. 85.
1 Lev. 47, 48.
Hutt. 90.

Ashfield versus Neal.

Action against two; and before Plea one of them dies. *Note*; by the late Act of — *W.* — Plaintiff may come and suggest this Matter on Record, and pray Leave to go on against the other; but if the Action were brought against one of them, the Defendant might plead in Abatement, that the other is living; but in this Case the Survivor pleaded in Bar, and Judgment was against him: And in entring up the Judgment, it was moved the Attorney should enter a *Non dedicit*, because he confess'd the Party dead by his Plea. *Holt*: Let it be entred so, and the other confess or deny it; and let him look how he puts his Costs upon it.

Dominus Rex versus Walden.

Indictment for
Words spoke
to Justice of
Peace.

Indictment, for that the Defendant being before a Justice of Peace, for a Matter, as it did appear, conusable by him, he contemptuously &c. spoke these Words; *Your Worship speaks to me here, but you dare not do so in another Place*; and it was quash'd on Motion.

Vide ante p.
394.
Charters.

Per Holt: We never order Charters to be brought into Court on Trials, when Copies of them may be had at the Rolls; but we will compel them to give you Sight of them.

Lacy verſus Kynaſton.

PER *Holt*: If *A.* covenant to do ſuch a Thing, and Covenantor agree to ſave him harmleſs, that is a Deſeazance of the Covenant. If two be bound jointly and ſeverally in a Bond, and Release is to one of them, it releaſes the ſeveral as well as the joint Lien. *A.* is bound by Bond to *B.* and *B.* covenants not to put it in Suit till ſuch a Time, it is a Deſeazance; but if he grants not to ſue upon it at all, it is a Release.

If Covenantor agrees to ſave Covenantor harmleſs, it is a Deſeazance.

Per Holt: Trover lies for the Maſter, for a Ticket or other Writing intitling his Apprentice to Money earned by him during the Apprenticeship; but here the Trover was againſt the Executor of the Apprentice for a Ticket given out after Death of Apprentice, for Money earned by him during the Apprenticeship; and becauſe it never was in the Apprentice's Poſſeſſion, the Action was not maintainable; but after Executor receives the Money, Maſter may have *Assumpſit* for ſo much Money received to his Uſe.

Apprentice's Maſter intitled to what Apprentice earns.

D E

Term. Sanct. Mich.

Anno 12 W. III. in B. R.

Prohibition
on Libel for
mending an
Organ.

EX *Motione B. S. milit'*, a Prohibition for libelling in Spiritual Court for a Parish Rate, for mending and cleansing the Parish Organs, was granted.

Johnson versus Ryson.

No Prohibition for Suit for a Mortuary, not having pleaded, there was no Custom.

1 Vent. 5.
Ante p. 326.

Ante p. 397,
404, 405.
Vide 1 Vent.
3, 120, 335.
2 Vent. 239.
2 Cro. 483.
N. B. 50.
3 Cro. 675.

Libel was in the Spiritual Court for a Mortuary alledged due by Custom; the Suggestion set forth the Statute of 21 H. 8. c. 6. and that there was no Custom in that Parish for Payment of Mortuaries. *Per Cur'*: There is no Colour for a Prohibition, since you have not pleaded; for a Mortuary is a Thing within their Jurisdiction; and if there were any Room for a Prohibition, it would be for Want of a Custom; and then that ought to have been pleaded: And he compared it with a *Modus decimandi*, for which there is no Remedy but in the Spiritual Court; and the Case in *Cro. Car. Hind v. Bishop of Chester*, is not like this; for the Statute excepts a Mortuary, and a Mortuary is a meer Ecclesiastical Right, for which there is no Remedy but in the Spiritual Court; and tho' a Writ of Annuity may lie for a Pension by Prescription, and so recoverable at Common Law; yet it may be sued for in the Spiritual Court, against the Opinion of *Co. 2. Inst. 491.* which has been frequently exploded ever since: And Rule for Prohibition was discharged.

Wilmout versus Tyler.

Appeal.
Where Person
has had Clergy
Time shall be
to plead.

HE was found guilty of Manslaughter upon an Indictment for Murder; and the Court at the *Old-Baily* being dissatisfied with the Verdict, inflicted eleven Months

Imprisonment.

Imprisonment upon him, according to the Statute of 18 *El.* Postea Pasch. c. 7. And being thus in the Sheriff's Custody, an Appeal was brought, to which the Sheriff return'd *Cepi Corp.* but that he could not bring him without a *Hab. Corp.* *Per Cur'*: The Return is not good; for it should have been *Cepi Corp. et parat' habeo*, and then the Appellant may have a *Hab. Corp.* returnable *immediate*; and you must be well advised how you file this Return; and the Return being amended, a *Hab. Corp.* taken, and Appellee brought to the Bar, and the Appellant call'd, who appeared. After the Appellee's Arraignment, which was in *French*, the Counsel for him demanded Oyer of the Writ, and Time to plead. *Per Cur'*: Of Right you ought to plead *instante*; but since he has had his Clergy before upon the Indictment, and so has a special Matter to plead, you ought to have convenient Time to plead; but it must be *quasi instante*, and as of this Day, and no Imparlance entred; and he was committed to Marsh. Postea p. 426.

Musgrave versus Escourt.

PER Holt: A Man may be nonsuited in Term-Time, Non suit, and the Record made up in the Vacation; but it must be on the Roll of the preceeding Term.

An Order of Justices of Peace, willing Churchwardens to pay a Scrivener five Pounds due to him for drawing of Indentures for setting out poor Children to Trades, was quash'd, as being a Thing out of their Power; but the Way had been to order a Parish-Rate for levying so much a Week till a convenient Sum were raised; and in that Case as soon as Money was raised, an Action would lie for the Scrivener against the Churchwardens. Order of Justices to pay a certain Sum, ill.

Dominus Rex versus Dorney.

AN Inquisition of forcible Entry was quash'd, for that it did not appear what Estate the Party on whom the Entry was made had; for if he were Tenant at Sufferance it would not lie. Forcible Entry, what Estate Party had must appear.

Wall versus Grovet.

1 Inst. 206. a.
 & lib. ibi cit'.
 Obligation to
 do an impos-
 sible Thing,
 is single.

PER Cur': If one binds himself in a Bond to go to a Place not in Being, or do other impossible Thing, the Obligation is single; and here the Case was, one laid a Wager that he would walk in such a Time to *High-Park* Corner, and the Place being *Hide-Park* Corner, and no such Place as *High-Park* Corner, he lost his Wager.

Dominus Rex versus Fowler.

*Excommunicato
 Capiendo.*

Cause need not
 specially to
 appear on Ex-
 com' Cap', as
 it must on the
 Significavit.

HE was brought up by *Hab. Corp.* being taken up upon an *Excommunicato capiend'* return'd in this Court; by which it appeared the *Significavit* was *pro subtractione decimarum sive aliorum jurium Ecclesiasticorum*; and *Northey* moved to have him discharged, for that the Cause, which ought to appear certainly in the *Significavit*, was altogether uncertain by the *Sive aliorum*, &c. And *per Holt*, the Writ of Excommunication need not specify the Cause, but is well generally *pro contumaciâ*. *F. N. B.* 63. *Reg. orig.* 65. but the *Significavit* ought to express the Cause. But since the Statute of 5 *El. c.* — by which the Writ is first to be brought into this Court, and to be delivered of Record to the Sheriff, who is to return it hither; the Cause ought to appear specially in the Writ, because otherwise the Court cannot know how to follow the Directions of the Statute; but the Doubt was, whether the Court could quash the Writ here for this Incertainty, or whether the Party should not go into Chancery, where the *Significavit*, which was only recited in the Writ, was, and move there to have the Writ superseded *quia erroneice emanavit*. And as to that *Northey* argued, That the Statute by directing the *Capias* to be delivered to the Officer of Record here, and returned here, did impliedly give the Court Power over it. *Vide 2 Cro.* 566, 567. *Cro. Ca.* 196. *Just. Jo.* 226. *Mo.* 667. *Holt*: I would see Precedents since the Statute, whether the Form of the Writ be changed since, as it were reasonable it should, that the Court might proceed or not, according as it seems to them proper, on the Face of the Writ; and if the Writ be bad, and by the Statute made returnable here, it is fit we should have Power over it; for when a Writ is gone out of Chancery, returnable in another Court, that Court, wherein it is returnable, are the Judges of the Validity of it; and therefore we

we ought to have the Writ itself here; and if it prove not good, to quash it *quia minus sufficiens in Lege*, and then send a *Supersedeas* to the Sheriff; but this ought not to be upon a *Hab. Corp.* but upon the Return of the Writ by the Sheriff. Indeed there have been several discharged upon a *Hab. Corp.* for one of the nine Cases within the Statute, but whether that should be upon Plea pleaded, or on Motion, was a *vexata questio*; and at another Day Precedents were produced *pro* and *con.* 8 *El. rot.* 20. general, same Year. *Rot.* 44. special Cause mentioned. 15 *El. rot.* 54. 17 *Ja. rot.* 111. *Hill* 17 & 18 *Ca.* 2. *rot.* 2. some as here, others with an *aliorumque jurium Eccl'*: And at last he said, he thought they were wrong upon the *Hab. Corp.* because it was a good Return to a *Hab. Corp.* that he was committed upon an *Excomm' capiend'*, without any more. And let Writ be quash'd *nisi* in a Week, and *Supersedeas nisi*; and that was the Rule.

Note; While this Matter was under Debate, the Party was bailed.

Anonymus.

A Woman was libell'd against in the Spiritual Court for Incontinency with a Man, since dead; suggested for a Prohibition that the Man was her Husband: And now the Spiritual Court could not examine whether he had been her Husband or not, because that would tend to bastardize the Children, and dissolve the Marriage after Death of Party. *Holt*: If there were a Marriage *de facto*, tho' illegal, yet they shall not libel to avoid it after the Husband's Death; but if there was none, the Death of the Man ought not to protect her from a Prosecution for her Whoredom.

Postea in this Term, *Hemming v. Price* Suit may be in Spiritual Court after Death of one of the Parties for Incontinency.

Dominus Rex versus Inhab' de Longcrichill.

PER Cur': If on Appeal a Parish be adjudged the last legal Settlement of a poor Person, that Parish is concluded thereby, not only as to the Parish from which the first Order of Removal was, but also as to all other Parishes. 2dly, It is a fatal Exception to an Order of two Justices, that it does not say that one of them was of the *Quorum*. *Vide Statute* 13 & 14 *Car.* 2.

If Order is confirm'd on Appeal, it is conclusive.

3dly, If an Order be made to remove a poor Person from A. to B. and then he comes to C. the Justices cannot graft an

an Order for sending him to *B.* upon the first Order, because they are not Parties to it; but such Order may be given in Evidence of a Settlement in *B.*

Posse in this
Term, Turton
v. Reignolds.

Per Holt: If a Person preach in a Parish Church without Leave of the Parson, he is a Trespasser.

Duke Schomberg versus Murrey.

*Scandalum
Magnatum.*

IT was moved to have Leave for the charging *M.* being Prisoner in *Newgate*, with a *Scandalum Magnatum*, and *ac etiam Bille* of 100 *l.* in order to hold him to Special Bail, for saying the D. of *S.* was a Cheat, and had cheated the King and the Army. *Holt*: 'This being a poor Man, to charge him thus, will be a perpetual Imprisonment to him, and Special Bail has been often demanded in these Actions, yet it has been frequently denied; but he was order'd to find two that would swear themselves worth twenty-five Pounds each, and himself be bound in one hundred Pounds.

Burnet versus Wells.

Words.
He is a Cheat,
not actionable
without a
Colloquium.

CASE: These Words spoke of a Tradesman, *he is a Cheat*; and further at another Time, with a *Colloquium* of him and his Trade, *he has nothing but rotten Goods in his Shop*, Judgment by Default, and several Writs of Enquiry. And *per Cur'*, this was prudently done, the first Words being not actionable without a *Colloquium*, and therefore intire Damages would spoil all. Thus the Plaintiff having released the Damages upon the first Words, took Judgment upon the second, which were held clearly actionable; but it was agreed, if the Words were only that he had rotten Goods, the Action would not lie; for the Slander is to have *Nothing but rotten Goods*. Jud. pro Quer'.

Heliard versus —

Person found
Bailiff gene-
rally must ac-
count for all in
Declaration.

PER *Holt*: If a Verdict find one another's Receiver or Bailiff generally, it subjects the Defendant to account for the whole Declaration; but if it find him Receiver only specially as to such and such Things, he is only accountable *pro tanto*.

Morley versus —

PER Cur': If Defendant plead as to Part, and says nothing as to the rest; it is a Discontinuance, unless Plaintiff will take Judgment by *Nil dicit*.

Discontin-
ance.

Hammond versus Ouden.

CASE: Plaintiff declares, That, in Consideration of seventy Pounds paid by him to the Defendant, the Defendant *super de assumpsit* to deliver to the Plaintiff on or before the eighteenth Day of *January* following, on board the Plaintiff's Ship in such a Place, twenty-five Quarters of Oat-Meal, and six Hair and splitted Sives; the Plaintiff alledges, that he did bring his Ship on the said eighteenth of *January* to the said Place, and that Defendant did not deliver to him, &c. Verdict and Damages for Plaintiff.

If Thing is to be done on or before a certain Day, must be there ready to tender it at the last convenient Time. Tender before will not excuse. Ante p. 399. Postea Trin.

Cowper took Exceptions to the Declaration. 1st, That it was altogether incertain, so that a Jury could not assess Damages upon it; for it did not appear how many of the Sives were to be Hair, and how many splitted. 2^{dly}, That the Things were to be delivered on or before the eighteenth of *January*; and the Breach is laid in not delivering on the eighteenth, when the Promise might be well performed in delivering at any Time before.

13 W. 3. Lanchashire v. Hillingworth.

But *per Cur'*: As to the *first*, if a Man binds himself to give another six Cows and Horses, it must be six of each, and it shall be taken severally as strongest against the Grantor; besides here it is laid *sex cribras*, *Anglice* Hair and splitted Sives, and we cannot take Notice, but a Hair Sive and a splitted one are the same. As to the 2^d, they held, (but professed there was no Occasion to be positive as to that,) that the Declaration was good enough, without saying that there was no Delivery before the eighteenth; for tho' the Defendant had Election to deliver them before the eighteenth, yet for that there must have been a Concurrence of the Plaintiff, for he must be there and accept; for the Defendant cannot make a Tender before the eighteenth, sufficient to excuse him from making a Delivery on the eighteenth; for the eighteenth being the ultimate Time the Law appoints for the doing it, the one Party ought to be there to tender, and the other to accept. And if the Defendant

1 Vent. 147. Vide 2 Cro. 9, 10. Yel. 36. 2 Cro. 14. 3 Lev. 104.

had come before the eighteenth to the Place and tender'd it, it would not excuse him from tendering at the Day. 3 Cro. 18. — Condition for Payment of Money at or before such a Day; upon which Debt was brought, and the Defendant pleaded, that he was at the Place at a Day before, and tendred the Money, and that the Plaintiff was not there to receive it, and held no good Plea; for tho' he had Election to pay before or at the Day, yet he cannot make Tender before the Day, if Plaintiff be not there willing to receive it, and you cannot compel him to receive sooner; therefore the last Day, which is the Day appointed by both Parties, they ought to meet, the one to tender, the other to receive. Ante p. 399. 3 Cro. 73. *Sed quare*, If he had given the Plaintiff Notice that he would deliver at such a Day before, whether Plaintiff ought not to be there then to receive. 2 Cro. 9, 10, 14.

But if the Declaration were faulty in that Point, yet it is help'd by Verdict; for if there had been a Delivery before the eighteenth of *January*, that would have made Issue for the Defendant, and the Jury could not find for the Plaintiff. 2 Lev. 23. 2 Saund. Peeters v. Opie. Action upon a Promise, that, in Consideration the Plaintiff should build a House for the Defendant, Defendant should pay Plaintiff 100 l. Plaintiff avers, that *parat' fuit et obtulit se*, and that Defendant did not pay him; and it was adjudged that this was no good Breach, for if the Defendant was to pay the Money upon building of the House, he should say that he brought his Materials, and that the Defendant hindred him, for he ought to shew that he has done all that was in his Power; but upon *Non assumpsit*, and Verdict, Plaintiff had Judgment: And this is a stronger Case than ours. 1 Sid. 13. 1 Saund. 228. Action for falsely and maliciously indicting, no good Declaration, without saying that it was without probable Cause, and that Plaintiff was acquitted, or an *Ignoramus* returned; and yet this Fault was helped by Verdict. 1 Vent. 219. A promises to pay B. Money, and if B. died within Age of eighteen, to pay to his Executor; Executor brings the Action, and avers that there was no Payment to him, without saying any Thing of his Testator, and yet cured by Verdict. *Jud' pro Quer'*. 1 Vent. 178, 214. 3 Lev. 104.

Clapham versus Wray.

PER Holt: When a Prisoner renders himself in Discharge of Bail in a Judge's Chamber, the Course is to have an Entry of it in a Piece of Parchment, signed by the Judges, which is sent over with the Prisoner to the Marshal, and ought to be brought back and filed in the Office, and is in Truth the Record; and the Entry in the Judge's Book is not very material.

Entry signed by a Judge, of a Person surrendering himself in Discharge of Bail, is the Record of it.

Per Holt: If a Person, pretending to be Mayor of a Corporation, put the Corporation Seal to a Deed, yet it is not by that the Deed of the Corporation.

Seal of Corporation must be put to by the Mayor.

Per Holt: In a Prohibition either of the Parties contending below may be Plaintiff.

In Prohibition either of the Parties may be Plaintiff.

Anonymus.

CASE upon three several Promises, and an Award ordering mutual Releases pleaded in Bar. *Per Cur'*: No good Plea, because nothing is awarded that bears an Action; but if there were any Thing awarded, for the which an Action would lie, it would be a good Plea, tho' it were not perform'd; and *Jud' pro Quer'*.

Award of mutual Releases not good. Ante p. 130. acc.

Per Holt: We never make a Rule upon a Sheriff to make a particular Return.

Per Holt: Tho' Inquisition of forcible Entry be quashed, yet Restitution is not of Course, contrary to *Raym.* 85.

Restitution, on forcible Entry quashed, is not of Course.

More versus Wats.

WAT'S was brought in upon a *Habeas Corpus*, before the Return of a *Capias* in *Withernam*, upon an *Ex longatur* returned upon a *Homine Replegiando*; and offered to plead *Non Cepi*, and give Bail. And *Shower* urged he ought to be received to do it; for that it is a Civil Action only for recovering of Damages for the Taking and Detainer, and likewise to procure the Party his Liberty;

Salk. 581. *Homine replegiando.*

Liberty; and that the *Capias* in *Withernam* was like Process of Outlawry upon mean Process, the End whereof is to put in Bail to the original Action; and if it were not so, this Process might be made a Snare for People's Liberties. This Writ of *Capias* in *Withernam* is no Writ of Execution; and we can have no Action of false Return against the Sheriff; 1st, Because the *Elongat'* is grounded upon an Inquisition. 2^{dly}, If he cannot replevy the Party, he can make no other Return; for he is not to take upon himself to falsify the Suggestion of the Writ. After a Presentment of a Grand Jury, the Party still stands *rectus in Cur'*, and may traverse it; *a fortiori* the Sheriff's Return of an *Elongatur* ought not to be conclusive; and he quoted the Case in 2 *Roll. Ab.* 462. that tho' Sheriff returns Outlawry of Felony, yet the Party may aver, that he appeared at the fifth County; but that Case was denied to be Law by the Court.

Mountague cont. This is not a Civil Action for Damages, and to have the Party enlarged, but is such a Prosecution, in which the Defendant, if convicted, shall be fined and pillory'd: And the very Command of the Writ is, that the Defendant should lie in Gaol till Party be suffered to be replevied by him; the Words are *donec præfat' M. secundum legem & consuetud' Angliæ replegiari possit*. Then there are no Precedents, that we can find, of Bailing in this Case; there are many in a *Homine Replegiando* for a Villain, where the Villain was bail'd, and the Lord ordered to make a Return. And he quoted the Lord Gray's Case in King Ch. 2.'s Time, where the Defendant, upon *Elongat'* return'd and Award of *Withernam*, came in, and was fined; and having obtained his Pardon, moved to be bail'd; and upon this the Judges assembled, and held, that the Return was conclusive, and that he could not be bail'd; but might have a false Return against the Sheriff, if he had wronged him; and if that Remedy failed by Death of Sheriff, they held, there might a Commission issue for the Taking an Inquisition of the Fact, which, if found against him, he might traverse and try by Jury, and so he had a Means to discharge himself. And he compared a *Capias* in *Withernam*, in this Case, to a *Capias ad Satisfaciendum*, both being with a *Quousque*.

Holi: The Case of the Outlawry is much a stronger Case, for that is for a Default in him in not appearing before, and sure the Case you cite is very hard to maintain, and the Reason they grounded themselves upon wrong, *viz.* that the Party was concluded by the Sheriff's Return of an *Elongat'*; and

we have two Records of a *Non Cepi* pleaded after an *Elongatur*; and so has the Law been holden several Times since, and Issues tried thereupon. And this is no Criminal Prosecution; for the King cannot have it, and Damages are always given in it. And Gould said, *Acetiams* have been added to such Writs.

Suppose he had come before *Elongat*' returned, and entered an Appearance, and after *Elongat*' had been return'd, there ought to be no *Withernam*; and if one had gone, it ought to be superseded upon pleading *Non Cepi*, without any Bail. And it is against all Reason, that they should be estopped by the Return to say that they have not taken him.

Ante p. 36.
If Appearance
be entered be-
fore *Elongat*'
return'd, no
Withernam
ought to go.

There is no Diversity between a *Homine Replegiando* and a common Replevin for Cattle. And if upon *Elongat*' in Replevin for Cattle, Defendant comes and pleads a *Non Cepi*, it shall supersede a *Withernam*; and so is *F. N. B.* And if we consider upon what Matter the Writ is grounded, it will appear not to be a Matter within the Sheriff's Knowledge; for the Writ supposes the Cattle or Party to be taken, and the Sheriff does not know whether it be so or not; and if he finds them not, to replevy, he can make no other Return but an *Elongatur*; and that puts an Obligation upon the Defendant to come into Court and discharge his Person or Cattle from a *Withernam*, by pleading *Non Cepi*.

No Difference
between a *Ho-
mine replegi-
ando* and Re-
plevin.

And it has been resolved since my Lord G.'s Time, that one might plead a *Non Cepi* after *Elongat*' return'd; and a *Withernam* is but a mean Process grounded upon the Return of *Elongat*'; and the Issuing of it cannot make the Thing worse than the Return had made it; and there never was any Law against Bailing one on mean Process. But here you come in too soon; for you cannot plead till the Writ be returned, nor bailed till after Plea pleaded; when you appear on the Return, you ought to move for them to declare, for they are demandable at the Return, as upon an Appeal; and if they do not appear, they shall be nonsuited, and the Defendant discharged, and Plaintiff put to a new Writ. If Defendant in Replevin comes in on the Replevin, he need not

Non Cepi may
be pleaded
after *Elongat*'
returned.

Withernam is
only a Process
grounded on
the *Elongat*'
return'd.

Ante p. 396.

gage Deliverance; but if he come not in upon the Replevin, but upon a further Process, he must gage Deliverance in some Cases; and he utterly condemned the Case in Raymond, before cited. Here is a Charge and a Denial, so the Matter is indifferent; and if the Defendant appear on the *Pluries Homine replegiando*, and plead *Non Cepi*, he shall not need to give Bail; but if he comes upon the *Withernam*, he may plead *Non Cepi*, but must give Bail, which is in the

Vide ante 36.

Raym. 474.
If Defendant
comes in on
the *Pluries*,
and pleads *Non
Cepi*, he need
not give Bail;
but if on the
Withernam he

must.

Nature of gaging Deliverance; *vide* 12 Ed. 4. 4. Upon a *Non Cepi* on Return of the Replevin, the Defendant is in Court without Bail; but if he comes in Custody there must be Bail, the Words of the Book are, *he must continue in Custody*, and that is in Bail. And here, because he could not be bail'd before Plea, and that he could not plead before a Declaration, which could not be till the Writ was returned; it was offered for the Defendant to accept a Declaration as of the Return of the Writ, but denied.

No Action of false Return will lie against the Sheriff on Return of *Elongat'*, where he could not see the Things to be replevied.

Ante p. 417.

Postea 429.

Bail must be in Nature of gage Deliverance.

Ante p. 36.

Non Cepi may be pleaded on Return of *Withernam*.

And here they held clearly, no Action of false Return would lie against the Sheriff for returning an *Elongat'*, in any Case, where he cannot have Sight of the Thing to be replevied, because he can make no other Return; but if such an Action could have lain, the Taking an Inquisition would not have prevented it; for it is not a Sheriff's taking an Inquisition where it does not lie, will protect him from an Action. And in an Appeal for Murder, after Return of the Writ, we bail, nay and give Time to plead, sometimes.

At the Day of Return of the Writ the Defendant was brought in again; and *Holt* said, he must plead a *Non Cepi* in Person in Court, and the Bail must be in a Sum certain, and in the Nature of gaging Deliverance, *viz.* that the Defendant shall appear *de die in diem* till Judgment; and in case Return be awarded, that he shall restore the Party to his Liberty, and pay all Costs and Damages, or surrender his Body to Prison. And he quoted the Case of *Dela Bastille*, who came in on the Return of *Elongatur*, whereby the *Withernam* was adjudged superseded; and that of *Sturville*, who came in on the very Day on which the *Homine replegiando* was returnable. And I never doubted, but a Defendant might plead a *Non Cepi* on the Return of a *Withernam*; for otherwise he would be in perpetual Imprisonment, and that would be hard.

Obj. The Plaintiff ought to declare in Person; and that he cannot now do, because we say the Defendant keeps him his Prisoner. *Answ.* In this Case, they that sued the Writ for him may for Necessity declare for him, and the Declaration is always *adhuc detinet*; and if in any Case the Plaintiff declared in Person, it must be where he was replevied, or where the Defendant brings him with him into Court as his Villein.

Obj. He ought to be in Custody till the Issue is tried; as where Cattle are replevied, the Plaintiff has them in his Possession till the Cause be determined. 11 H. 4. 10.

Ans. 7 Ed. 4. 15. Upon the *Pluries, Elongat'* was re- turn'd, the Defendant appeared; a *Withernam* is awarded, and that should not have been; and therefore a *Superfedeas* was sent to the Sheriff, because the *Withernam* issued erroneously; upon the *Superfedeas* the Sheriff returned, that before the coming thereof he had delivered the Defendant's Cattle to the Plaintiff in *Withernam*; and that as soon as he received the *Superfedeas* he came to the Plaintiff, to make Restitution, but that he had cloin'd the Cattle; and thereupon the Defendant prayed a *Withernam* against the Plaintiff, and had it. And where the Defendant appears, and pleads *Non Cepi*, or claims Property, there never ought to go a *Withernam*; but that Writ only goes where the Thing cannot be replevied, and Defendant will not come and plead.

If Defendant appears on the *Pluries*, no *Withernam* to go.

Obj. The Writ in the *Register Orig.* 79. commanding the Sheriff to enlarge the Lord taken in *Withernam*, upon his producing the Villein to be replevied, would be useless, if that be so.

Ans. That Writ is to enlarge the Lord, upon his suffering the Villein to be replevied; before the Day of Return he is to be enlarged by that Writ, which otherwise the Sheriff could not do, as he thought, or at least would not.

Indeed, if the Defendant comes in upon the Day of *Pluries*, returnable, or Return of *Elongat'*, and avows, or pleads other Plea, which puts not an End of the Matter, there may be room for a *Withernam*; but if he plead *Non Cepi*, or claims Property, which puts an End to the Matter, such Plea is a *Superfedeas* of the *Withernam*. And where he denies the Taking, there is no Reason why he should be imprisoned till that be tried; for there is only a bare Affirmation to charge, and there is his Negation against it; so the Matter stands indifferent, and the Sheriff's Return does not strengthen the Matter a whit; for he cannot help making such a Return, where he finds not the Thing to replevy.

Obj. The Command of the Writ is to detain, *quousque* he suffers Plaintiff to be replevied.

Ans. True, the Sheriff cannot discharge him *quousque* that be done; the first and *Alias* in Replevin are only in Nature of a *Justicies* empowering the Sheriff to hold Plea of the Matter by Replevin in the County, and the *Pluries* is the Original on which Plea is holden in the Courts above; and the first and second are not returnable, but the third is returnable upon the Sheriff's Default of holding Plea upon the *Justicies*; and that after *Elongat'* return'd, the Defendant

The *Alias* in Replevin in Nature of a *Justicies*.

If Cattle be taken in *Withernam* by Way of Execution, in Replevin, Plaintiff has Property; but not where it is but a Process.

dant may plead a *Non Cepi*; vide *Kel.* 71. *N. B.* 74. And if Cattle be taken in *Withernam*, by Way of Execution in Replevin, the Plaintiff thereby gains an absolute Property in them in lieu of his own; but not so where the *Withernam* is a Process. If one declares in Replevin for Cattle with an *adhuc detinet*, and Defendant has Judgment against him for Damages, by Payment thereof the Property of the Distress shall be vested in him; but in *Homine replegiando*, tho' he plead a *Non Cepi*, and upon that found against him, Judgment be for Damages against him; yet the Liberty of Man is such, that thereby he can gain no Property therein, but a *Capias* shall go against him, and he thereupon shall be kept in *Withernam*; and the Precedents in *Rastall* upon this Head, are not to be depended on. If *Homine replegiando* be brought, and the Defendant claim the Party as his Villain, that will be a good Return for the Sheriff to make; and there shall be no Replevin till Plaintiff give Security, and that in Court; and then there shall go a Writ, reciting the Security entered into Court, to the Sheriff to deliver the Plaintiff; and when the Plaintiff comes in upon that Security so entered into in Court, he is not at large, but to find new Security, that he shall appear from Day to Day, pending the Cause; and that if Judgment go against him, he shall render himself to the Defendant, and he takes him out of Court. *Vide* 8 *H.* 4. 2. *F. Mainpernor* 21. 32 *H.* 3.

If one is bail'd in *Withernam*, and the Issue be against him, he is to be render'd to Custody.

2 Cr. 67.
Yelv. 59.

When a Defendant comes in upon a *Capias* in *Withernam*, and is bail'd, that is but an Easing of the Custody he was in upon the *Capias* till the Matter be tried; and then if the Issue be against him, he is, I think, to render himself into Custody again, and then he is in by Virtue of the *Capias* in *Withernam*: Like the Case of *Audita querela* by one in Execution; if it be upon a Deed, Nonage, or the like, the Court does bail the Plaintiff, upon Condition of a Recognizance to pay Damage, or render his Body to Prison; and if the Matter be against him, and he render himself to Prison, he shall be in upon the first Execution; and so he will here, by Virtue of the *Capias* in *Withernam*. But suppose he does not render his Body in Execution, can the Court award another *Withernam*? And I think it can; and it is like, where a Man is bail'd upon an Appeal of Murder to appear from Day to Day, if he makes Default, it shall be recorded, and Process shall go against his Bail, and a *Capias* against himself; and if he does not make Default, but comes in Discharge of his Bail, he shall be committed as at first. But suppose in Replevin Defendant appears at the *Elongat'* return'd,

turn'd, and plead *Non Cepi*, which is found against him, what shall be done then? There shall be Judgment, and a *Withernam* thereupon; and the Reason is, because a Pleading a *Non Cepi* upon the *Elongat'* is a *Supersedeas* of the *Withernam* at first, and that is after falsified by the Verdict, which thereby takes off the *Supersedeas*, and then the Matter is open for a *Withernam*. And it is like the Case of *W. 2. c. 46.* whereby a Writ of Inquisition issues out of Chancery, returnable here, to inquire of Malefactors throwing down Inclosures *noctanter*, &c. and upon Return thereof a *Distringas* shall go to summon the adjacent Villis to repair, and to inquire of the Mischief, and to command the said Villis to make Restitution; and the Writ in that Case has Words of Execution in it to levy the Damages found, and to bring them into Court; yet because it gives a Day to the adjacent Villis to come in and plead, they may come, and either traverse the Inquisition, or demur to it, and till that be tried Proceedings shall stop; but after Judgment they are let loose again, and a *Distringas in infinitum* shall go. *1 Cr. 280.* This was devised by *Noy*, then Attorney General, upon the Reason of the Law, tho' there were no Proceedings upon that Statute since the *13 Ed. 1.* till that Time. In like Manner in our Case, by Appearing and Pleading upon the *Withernam*, a *Non Cepi*, Proceedings are stopped till that Issue be determined; and when that is done, they shall be open'd again; but there are no Precedents for this, but the Reason of the Common Law. And if he does not appear, he forfeits his Recognizance; and besides a new *Withernam* shall go against him; and if he does not make Default, you have him in Execution upon the old Process revived; indeed we are in an untrodden Path, but go upon the Reason of the Law in like Cases. And here he shall not gage Deliverance, because he pleads he has him not; if he had confessed the Taking, he must have done it; or if he had pleaded in Abatement, he must have gaged Deliverance conditionally, that is, if he had taken him; and thereupon a Writ should go to the Sheriff, to which he might return that he has him not; and upon *Non Cepi* there shall be no Gager of Deliverance in Replevin for Cattle. *N. B.*

And he said, they should have the Writ in Court, and be ready to declare, for they were demandable at the Return-Day in this Case, and in Replevin for Cattle, as well as upon an Appeal.

If *Non Cepi* be pleaded, and found against him, Judgment shall be, and *Withernam*.

1 Jo. 306.

By Appearing and Pleading on the *Withernam*, all Proceedings to stay till Issue determined.

Ante p. 396, 425. Are demandable on the Return-Day.

And tho' here we take Bail, yet some Entries are *et statim committitur custod' Maresch' ibi remansur' quousque* he suffered the Plaintiff to be replevied. *Vide 5 H. 4 Rot. 25. Hom' repl.* to the Sheriff of *Devon*; and on *Elongat'* return'd, a Suggestion of a *Latitat* to *Somersetshire*, and a *Capias* in *Withernam*: And after Party came *coram Domino Rege apud W.* and several *manuceperunt* him, to keep him *quousque replegiari voluerit, &c. Hill. 16 R. 2. Rot. 16.*

In *Pluries Replevin* there is a Day in Court.

We are also of Opinion that the *Pluries repleg'* gives a Day in Court; for there is no Day in common Replevin but as here, to deliver Cattle, or shew Cause to us such a Day why he did not, or could not; and there is no express Summons of the Party, but only an implied one; and if he appear not then a *Pone* shall go, and, if he makes Default to that, a *Capias*. Indeed in *Rastall* the Entry in a *Homine repleg'* is *Attachiat' fuit*; and the Reason is, because the Party himself ought to appear: And if a Writ be return'd unexecuted, as a *Nil habet per quod summoneri possit*, he may, notwithstanding, appear to prevent a *Capias*; and what Day have the neighbouring Vills upon the *Distringas*, according to the Statute, but the Return of the Writ? and yet there they may come and traverse the Fact's being done *noctanter*, or that they were the next Vills, or even the Damage; and what Day has the Plaintiff in any Case but the Return of the Writ? and in Consequence of Law the Party may be said *attachiat'* in Replevin; and so in this Case with a Witness, where he is brought in in *Withernam*; but you must not take Notice of his being in Custody in any Case, but where he is in *Custodia Mareschalli*, tho' he be actually in Gaol. But the clearer and better Way of declaring will be to say thus, *Dominus Rex mandavit Vicecomiti breve suum, &c.* and so set forth the whole Replevin, Return, *Withernam* and the Return thereof; of which see a Precedent in *Rast. 560.* in Replevin for Cattle. And this is the better Way, because the whole Matter will appear on Record; in the Common Pleas they only recite the Substance of the Writ, but here in this Court it is set forth *in hæc verba.*

Postea p. 435

Obj. Here they cannot make an Attorney for the Plaintiff, and he is not to be found to make one for himself. *Resp.* Since the Law enables him to sue this Writ by Friends, it will of Consequence enable them to make an Attorney for him. But another Doubt was, whether the Plaintiff being an Infant, he should prosecute by Attorney, or *prochein amy*;

amy; ad quod non fuit responsum. And here the Writ being against three, one whereof only was brought in, it was doubted by the Plaintiff how they must declare; to which it was answered, they must do as if it were in an Appeal, declare against him that appeared, and continue Process against the others. And *Holt* said it would be a Question whether the Plaintiff should not be put to find Pledges; but at last the Plaintiff was demanded, and would not declare, and so was nonsuited, and the Defendant discharged.

Where the Writ is against several, must declare against those who appear, and have Process against the others. If Plaintiff is demanded, and will not declare, shall be nonsuited.

Note; While this Case was under Consideration, *Holt* order'd Mr. Clerk the Secondary to prepare a Draught of the Recognizance, which the Bail were to give; which he did; and after great Consideration *Holt et Cur'* approved of this that follows:

Et super hoc vener' hic in cur' dicti Domini Regis coram ipso Rege A. B. et D. et manuceperunt, et quilibet eorum manucepit pro prefat' D. Watts ad habend' corpus ejus coram Domino Rege apud prefatum tru', et sic de die in diem quousque judicium inde redditum fuerit. Et si contingeret quod idem D. W. convincetur, quod tunc ipse prefat' D. W. se Prisonæ Maresch' Maresch' dicti Domini Regis coram ipso Rege in Withernam reddet ibid' moratur' donec prefatum W. M. e custodiâ suâ deliberabit; et ad largum quo voluerit ire permittet; vid. quilibet manucaptorum præd. in hac parte sub pœna quingent' librarum, quam quidem summam quingent' librarum iidem manucaptore concedunt, et quilibet eorum concedit de terris et catallis suis et eorum cujuslibet fieri, et ad opus præd. Th. M. levare, si contingeret præd. D. W. ad prefatum tru' seu aliquem alium diem per Cur' Domini Regis hic in præmiss. præfix' aut præfigend. personaliter non comparere, aut si contingeret judic' versus præf. D. W. in hac parte reddi et præf. D. se dicti Prisonæ Mar' Maresch' ea occasione non reddere.

Per Holt: A Person of ill Fame is notailable by the Statute of W. 2.

Person of ill Fame notailable by W. 2.

Per eundem: When a Matter is referr'd to the Master of the Office to examine, and a Summons or a Service of the Rule to the Party, if he will not attend, Master may examine *ex parte* without Motion.

Per eundem: One is not to be heard for one in Contempt, or convicted, without his Client be in Court.

Hemming

Hemming versus Price.

Suit may be
in Spiritual
Court against
a Woman for
Incontinency
after the
Death of the
Man, whom
she suggested
to be her
Husband.

Ante. p. 419.

It is only a
Marriage *de
facto*, which
shall not be a-
voided after
Death in the
Spiritual
Court.

SHE was libell'd against in the Spiritual Court *ex officio*, for Adultery with one now dead, by whom she had Children living; and having pleaded below, that she was married to him, it was replied, that she had a former Husband then living; and a Prohibition was moved for, suggesting the Matter of the Plea. And it was urged, that by sentencing her, they would in Effect bastardize the Issue, which ought not to be after Death of one of the Parties. But *Holt*: Do you think that if a Man and a Woman cohabit together, and have Issue, and one of them dies, that that shall protect the other from being proceeded against in the Spiritual Court for Fornication; and this shall not bastardize the Issue, for he was a Bastard without any Proceedings of theirs, if the Parents of it were never married. And the Meaning of the saying, that one shall not be bastardized after the Death of either of his Parents, is, that the Spiritual Court shall not proceed to dissolve a Marriage *de facto* after Death of either Parties, as in case of Consanguinity, Precontract, &c. but in this Case, if the Replication below be true, the Marriage was *ipso facto* void. *Vide 7 Co. Kenn's Case 43. b. 44. a. Style's Rep. 10.* Administration was committed to a Woman, as Widow of *J. S.* and a Libel was in the Spiritual Court to repeal the Administration, upon Suggestion that *J. S.* had a former Wife living at the Time of his Death; and there indeed a Prohibition was granted. *Vide Wine v. Selleck, Trin. 2 Jac. 2.* One having two Wives died, and one of them libell'd against the other for Jactitation of Marriage; and she suggested that it was to avoid her Marriage, and a Prohibition granted. And none of the Cases in *1 Ro. Ab. 356.* are like this. *22 Ed. 4. Fitz. Consultation, pl. 5.* *A.* marries *B.* and after turns her off, and takes *L.* to Wife, by whom he has Issue, and dies; after his Death the former sues the second Wife to avoid the Marriage, and held it could not be, because the Husband was dead. But here is no Libel to question the Marriage, but to punish for Fornication; it is true her Defence is, that she was married, and Question only is, whether when they have Jurisdiction of the Matter, and Issue, arises upon the Defendant's Plea, whether they shall not try it; and why not as incident to the original Cause? But where their Law does not agree with ours, they shall indeed judge

judge of the Incident, but not according to their Law, but according to ours, if both Laws vary in the Point. And the Sentence in the Spiritual Court in this Case would be no Conclusion to the Child, as it would be in Case of Divorce; and it is for Fear of a Conclusion there cannot be a Divorce after Death of one of the Parties; and this being a Prosecution *ex officio*, ought not to be discouraged; and *per Cur'*, no Prohibition.

Turton versus Reignolds.

A Legacy of fifty Pounds *per Annum* was left as a Maintenance for a Parson to Preach once a Week in the Parish Church of *B.* he was to be chose and removed by the Majority of the Parishioners; who chose one *R.* whom the Churchwardens refused to open the Church to; whereupon he libell'd against them in the Spiritual Court; and a Prohibition was granted, for that he did not shew he had a License from the Parson of the Church, in whom the Freehold of the Church is, and without whose Consent none can preach in his Church. It is true it may be an Ecclesiastical Offence for Churchwardens to shut out the Parson, or any other appointed by him to preach in the Church; yet it cannot be one not to open the Church for one appointed by a Stranger, without he has the Parson's License; and you should have shewed in your Libel, that you had such a License. And *Holt* was of Opinion, if the Ordinary had appointed one to come and preach in such a Church, yet he could not justify doing it without Consent of the Parson. And if a Person give a Charity to a certain Clerk for preaching in such a Parish, he must do it by the Consent of the Parson.

And *Holt* further said, That let a Parson be ever so orthodox and able, yet he is punishable for his Presumption, if he preach without License of the Ordinary; but the Ordinary *ex debito justitiæ* ought to give such License to one that is fit; but if he does refuse, no *Mandamus* will lie, but his Remedy is to appeal.

Postea Hill.

13 W. 3.

Finch v.

Harris.

No one can preach in a Church without Leave of the Parson.

Ante p. 420.

No one can preach without License of the Ordinary.

Rosiere versus Sawkins.

Master of a Ship has the Power of choosing the Sailors, and not the Owners.

Postea p. 440.

TRespass by the Master for a Battery on the Servant, *per quod, &c.* Defendant pleads, That the Plaintiff and three more were Owners of a Boat for conveying of Passengers between *L.* and *G.* and they constituted the Defendant Master of it; and that finding the said Servant on board Damage-feasant, he took him and turn'd him out. Plaintiff replied, that being Part-Owner, he commanded him to go on board and serve there; to which the Defendant demurr'd; and adjudg'd *pro Defendente*; for when the Part-Owners had made the Defendant Master, they could not put any Servants upon him without a special Agreement for it, for Breach whereof an Action would lie; for the very making him Master impowers him to choose his Servants, for he is answerable for all Events, and therefore but reasonable he should have Liberty of choosing such Men as he can confide in, and for whose Honesty and Diligence he may take Security; and the Owners have no Means to avoid it but to recall the Master's Authority; and it is one of the Inconveniencies of Jointenancy, that one alone cannot do that. *Jud' pro Defendente.*

Information.

Information was filed against a Gaoler for suffering one taken up upon an *Excommunicato capiendo*, to go at large.

Snow versus Firebrasse.

Quantum meruit.

Quantum meruit on a special Promise, That whereas the Plaintiff, at the Request of the Defendant, did find the Defendant with Meat, Drink and Lodging for *several Months*, he promised to pay him what it was worth. After Verdict it was moved in Arrest of Judgment, that the Declaration was too incertain for the Time; but being after Verdict it was held well, as *indeb' pro diversis mercimoniis*, especially being executed. *Et Jud. pro Quer'.*

Blaxton versus Honore.

D *Arnell* urged, that if it appear on the Face of the Libel, that Ecclesiastical Court has no Jurisdiction, they may be prohibited without Suggestion; but *Cur' contra*; for the Suggestion is a fundamental Point, and is the Declaration on the Writ. *Vide 2 Inst.* —. 12 Co. 63. where the Complaints of Spiritual Courts against Common Law Courts were examined; and the great Care of the Judges in requiring Suggestions, before they would grant a Prohibition, much admired.

Prohibition
not to go to
Spiritual
Court with-
out Suggesti-
on.

Dominus Rex versus Pursey.

A N Indictment filed *Pasch.* 10 W. 3. Rot. 42. was, that *A.* using the Trade of buying and selling Cattle *apud* *B. in Com' M.* did buy and expose to Sale bad Cattle, &c. and it was quashed for Incertainty; for if it be understood that the using of Buying and Selling was at *B. in Com' M.* there is no *Venue* where the Exposing to Sale was; and if (*B. in Com' M.*) be applied to the Place of Sale, there is no Place laid where the Using the Trade was; so *quacunque via* it will be impossible to make it good: *Per Cur'.*

Indictment
quashed.

When Exception is taken to Bail, there ought to be Notice of it to Defendant's Attorney: *Per Cur'.*

Notice to be
given when
Bail is except-
ed to.

When one is removed hither by *Habeas Corpus*, and turn'd over, there is a *Committitur* sent over to the Marshal with him, and that ought to be brought back and filed in the Office; and let that be observed.

Ante p. 423,
430.

Per Holt: One charged with Buggery not bailable.

One charged
with Buggery
not bailable.

Per eundem: When Proceedings are set aside for Irregularity, there shall never be Costs.

No Costs
where Pro-
ceedings set
aside for Irregularity.

Adams versus Arnold.

A Ction upon several Promises; and in Assigning the Breach it was & *præd' Ad.* the Plaintiff *non*, &c. upon Demurrer, *Jud' pro Def.*

Breach.

Dabois

Dubois versus Trant.

Administra-
tion commit-
ted to one *du-*
rante minori
etate of an
Executor,
whether on
his Dying un-
der Age it
may be re-
peal'd, and
committed to
residuary Le-
gatee.

A. By Will devises 800*l.* to his Wife, and the Residue of his Personal Estate to his Son, an Infant, when he came to the Age of twenty-one Years, with Provision for his Education in the *Interim*; and if the Son died under Age, the Residue to his Nephew, who was likewise under Age, upon the same Contingency; and if he died under Age, the Residue to the Plaintiff *Dubois*, who now sues in the Spiritual Court. He makes his said Son Executor, and dies; Administration *durante minoritate* is committed to the Mother; the Son dies Intestate, the Nephew continuing under Age. *Dubois*, the contingent residuary Legatee, in Case the Nephew died under Age, being also next of Kin to the Nephew, libels against the Widow to have her Administration repeal'd. And a Prohibition was moved for, for these Reasons: Executors and Administrators are Officers in Trust for the Testator and Intestate; and as Ordinary cannot change an Executor appointed by the Party; so now since the Statute of 31 *Ed.* 3. and 21 *H.* 8. it is directed to whom Administration shall be committed; and once the Ordinary has executed his Authority, (for since the Statute he has no more,) the Administrator has the same absolute Property that an Executor has; and the Ordinary shall not interfere: And it cannot be denied, but the Wife here was next of Kin to her Husband and her Son, who was residuary Legatee, and who, as such, should have administer'd if he were of Age, if the Father had died Intestate. *2dly*, Administrator is a Temporal Officer, of which Common Law takes Notice; and tho' Custom of the Realm allows the Ordinary to create him, yet he cannot destroy him after. *3dly*, The Inconveniency would be intollerable, if Ordinaries had such a Power to repeal; for he might do it in the midst of a Suit by a Creditor against him, and so abate his Suit, to the great Vexation of Creditors; or it might be in the midst of a Suit by an Administrator, to recover Assets to discharge just Debts, to the great Waste of Assets, and likewise to the great Prejudice of Creditors. *4thly*, It is frequent with them to grant Administration with a Limitation or Condition, which shews, that in their own Opinions, they cannot revoke; for otherwise, what need they grant them upon Condition?

Postea 443.

To which it was answered, that most clearly an Administration may be revoked, but in what Cases is the Question; and this Diversity was put, that regularly, when the

Statute

Statute of 21 H. 8. is rightly pursued by the Ordinary, he cannot after revoke such Administration granted according to the Statute; and in that Case the Administrator gains an absolute indefeasible Interest therein. But where he does not pursue the Directions of that Statute in granting Administration, he gives indeed an Interest to the Administrator, but a defeasible one, and such as may be after repeal'd; as if there be two in equal Degree, or Wife and next of Kin, there he has Election to which of them to grant it; and therefore if he grants it to one of them, he shall not avoid it; but if, intending to grant it to next of Kin, he should grant it to one more remote, he may after revoke it at the Suit of the next of Kin. *Vide* 1 Sid. 293, 409.

Where Directions of the Statute are pursued, Administration cannot be repeal'd; but where they are not, may revoke.

Then it must be admitted, that the Right of Administration is now in the Infant residuary Legatee; and this they admit in their Suggestion, that she has Administration in Trust for the Infant residuary Legatee, to whom she is not next of Kin; so the whole Question is, whether Administration, which a residuary Legatee ought to have, if he were not under Age, can be well and irrevocably committed to one that is not next a Kin to him. *Vide* Dy. 372. 1 Vent. 317. 1 Sid. 280. That Right of Administration belongs to the residuary Legatee by the Equity of the Statute; then the Matter is no more than this, that the Bishop gives the Curatorship of this Infant to her, and why may he not take it from her again, if he sees Occasion; for it is no Disturbance of the Right, for that always remains in the Infant; and it is like a Guardian appointed by the Court of Chancery. And it would be very inconvenient, if when the Right of Administration is in one, who, in Respect of Infancy, is incapable of administering, and Spiritual Court grants it to another, if they should not have Power to revoke it upon Occasion; for otherwise the Administrator might waste all the Estate of the Infant.

By the Statute of 21 H. 8. c. 5. §. 3. and 22 & 23 Car. 2. c. 3. upon granting Administration, Ordinary ought to take a Bond, &c. which is not done here, therefore he has not pursued his Authority; *ideo* Administration not absolute. If Administration be granted to a Person then solvent, *Compos mentis*, or within Communion of the Church, who after becomes insolvent, *Non compos* or excommunicate, shall it not be repeal'd? *Vide* 3 Keb. 124, 131, 282.

Holt: Where there is an Executor under due Age, if there be Legacies, the residuary Legatee ought to have Administration

Where there is an Executor under Age, Administration

5 T

on shall be committed to the residuary Legatee. 1 Jo. 225. 1 Cr. 201. Ante 306. 2 Lev. 55. 1 Vent. 217.

ministration *durante minoritate*, and not the next of Kin to the Intestate; because that by the Statute of 31 *Ed.* 3. it is to be committed to the most foyal and next Friend of the Intestate; and the making a Residuary Legatee in such a Will is a manifest Indication that such a Testator took that Person, whom he has so made, to be his next Friend. If Feme Covert dies Intestate, leaving divers Debts due to her before Coverture, and Administration is committed to her Brother, or other next of Kin, it shall be repeal'd and granted to her Husband; and that has been so adjudged in the Common Pleas, in the Case of *Duncomb* and *Mason*. But the principal Case is very considerable; and there was the like Point in Ch. J. *Pemberton's* Time, and a Prohibition granted, but the Point not determined: Most certainly, by this Grant of Administration, an Interest is granted and vested in the Administratrix. If Administration be granted to a Creditor, and after a more principal Creditor comes, it shall not be revoked for him; and it may be here *factum valet, fieri non debuit*; before the Statute of *Ed.* 3. the Administrator was but a meer Servant of the Ordinary, removeable at Pleasure, but since he has the absolute Property. Indeed an Administrator *durante minoritate* shall do nothing to the Prejudice of the Executor; and there is a Diversity, in Point of Determination, between an Administrator *durante minoritate* of an Executor, for that shall only indure till Executor comes to Seventeen, at which Age he may act as Executor; and Grant of Administration *durante minoritate* of *J. S.* for that shall hold till he comes to Twenty-one. *Gould* accord; and it is hard to maintain, that a Grant of Administration to one during Minority of one that has Right to administer, is a bare Authority. And *Holt & al.*, at another Day, it is a Point worthy of Consideration, and much may be said to prove that the Ordinary has executed his Authority; therefore let Prohibition go, and declare immediately.

1 Jo. 228.
Postea Pasch.
13 W. 3.
Reek v. Thomas.
Ante p. 194.

Postea 445.

Outlawry.
Lease is forfeit before Seizure.
Ante p. 176.
Hard. 101.
Raym. 17.

Per Holt: By Outlawry, Lease for Years is forfeited before any Seizure; and therefore if it be sold after Outlawry, and before Seizure, the King shall avoid the Sale; but if one outlawed sell an Estate in Fee before Seizure, the Sale is good, and the King shall not have the Pernancy of the Profits; but if the Sale be after Seizure, the Sale shall hold, but the King shall have the Pernancy of the Profits; but even in case of a Lease there ought to be an Office found for the King. *Vide Cro. Jac.* 82.

D E

Term. Sanct. Hill.

Anno 12 W. III. in B. R.

Anonymus.

UPON a Question, whether a Conveyance made by a Bankrupt, a short Time before Act of Bankruptcy committed, were fraudulent or not, these Points were agreed by the Court; 1st, That the Sale being to a near Relation of the Party's, was some Mark of Fraud, tho' not a conclusive one; because Relations might be real Creditors, or give a valuable Consideration. 2^{dly}, The Non-payment of Money at the Time of executing the Deed is another. 3^{dly}, It is some Evidence of a *bona fide* Conveyance, that the Deed mentions Money paid; but that had need of other corroborating Circumstances, as Enjoyment.

Per Cur': If there be Evidence of both Sides, and Verdict against the Strength of Evidence, if such Trial be not peremptory, there ought not to be a new Trial. General Causes of new Trials are Want of due Notice, Practice or Misdemeanor in Jury, in either Party or their Agents; the Absence of some material Witness which they could not then have; Verdict against Evidence, excessive Damages, &c. *Note*; In many Cases, upon granting of new Trial, the former Verdict ought to stand as a Security; for otherwise the Party, against whom it passed, might spirit away the Evidence on whose Testimony it was obtained; and so, without any Corroboration of his Right, deprive him of the Benefit of his Verdict.

New Trial,
Causes for
granting it.

Grant

Grant versus Baily.

Salk. 33.
Mate of a Ship
may sue in
Admiralty.
1 Vent. 146,
343.
Ante p. 405.
406, 434.

MATE of a Ship libell'd in the Admiralty Court for his Wages; and Prohibition moved for by *Raymond*. And agreed *per Cur'*, it ought to go in case of a Master; *secus* in case of Mariners; and the Mate being a Mean between both, it was doubted; but Court inclined to consider him as a Mariner, because he is hired by the Master, as other Mariners; but the Master is put in by the Owners. And after, upon Conference with the Common Pleas, where a like Case was under Consideration, ruled that no Prohibition should go.

Executor.

Per Cur': The Reason why an Executor, Defendant or Plaintiff, upon a Nonsuit, shall pay no Costs, is, because the Suit being *in auter droit*, he may well be thought misconusant of the Truth of the Cause of Action.

Attorney on
Record not to
be changed
without Leave
of the Court.

Per Cur': One cannot change his Attorney on Record, without Leave of the Court; and after Judgment the Attorney on Record may receive and acknowledge Satisfaction, by Virtue of his former Warrant; and when Attorney of Record is changed, the Record ought specially to mention that it was by Consent of the Court.

The King versus Sir Hugh Everard.

Parish may
tax themselves
to carry on a
Suit for the
Publick Good
of the Parish.

A Rule was obtained by Surprise, for Leave to file an Information against him, and several other Parishioners of the Parish of — in *Essex*, for laying a Tax upon themselves for carrying on a Suit against their Vicar in the Spiritual Court for Incontinency. And the Court held, they might lawfully tax themselves, by Consent, to carry on a Suit for the Publick Good of the Parish; but in that Case the Majority could not bind the rest, without their Consent, as in case of other Rates. But the Information being filed, it was referred to Master of Office.

Vide ante
P. 154, 155.

Per Holt: Acts of Parliament on the Rolls are not distinguished into Paragraphs, but that is done by the Printer.

Per eundem: 'Tho' an Executor *de son tort* pays Debts duly, with all the Assets that come into his Hands, yet the rightful Executor shall maintain Trespass against him; but he may give such Payment in Mitigation of Damages; yet the Right of the Action and Verdict shall go against him.

Postea Pasch.
13 W. 3.
Lane v. Sir
Rob. Cotton.
Payment of
Debts by Ex-
ecutor *de son*

tort, is only in Mitigation of Damages.

Per Cur: If *Scire fa'* be returned served, and the Defendant has an Act of Parliament for his Discharge, and omits to come and plead it, he has for ever lost the Advantage of it.

If on *Scire*
fac' return'd,
Defendant
does not plead
what he has

in Discharge, the Benefit of it is lost.

Dominus Rex versus Margason.

HE was committed to Newgate upon the Act of 8 & 9 W. 3. upon Refusal of paying such Money as was in his Hands as Collector of the Taxes; and removed up by *Habeas Corpus* the last Day of last Term; and then, *absente Holt*, a Rule made for to bring him up the first Day of this Term, without filing the Return. *Holt*: 'Tho' such a Rule might well be for the bringing one up, in a Day in the same Term, without filing the Writ, yet it ought not to have been to bring him up at a Day in another Term, without filing the Return; for he cannot now be brought up upon a Writ returnable in a precedent Term, by such a Rule, without the Return thereof be filed; therefore you must take out a new Writ. And this being a Cause concerning the King's Revenues, you had best give Notice to the Attorney General; for we ought not to file a Return of any such Matter removed hither, without Notice to him.

On *Habeas*
Corpus Rule
may be to
bring him up
any Day the
same Term,
without filing
it; *aliter* if to
be in a subse-
quent Term.

Per Holt: If Covenant be to pay a Sum to a Stranger, at such a Day and Place, Tender and Refusal is no Excuse of Non-performance.

Tender and
Refusal.

Per eundem: A Master cannot assign over his Apprentice, as he may another Chattel, but it must be with his own Consent.

Apprentice
not to be as-
signed without
his Consent.

Per eundem: There needs no Notice to Church-wardens, &c. of a Servant's coming into a Parish to gain a Settlement; because the Justices of Peace, tho' there had been Notice, cannot disturb him.

No Notice in
respect of a
Servant's gain-
ing a Settle-
ment.

Pleas in Bar
and Abate-
ment.

Per eundem: There is a Diversity between Pleas in Bar and Abatement, as to Time; for if one be to plead before Effoin-Day, suppose of *Mich.* Term, if he plead in Bar any Time before *Craft animarum*, it is well; *secus* in Abatement.

West versus West.

In Amend-
ment of Decla-
ration, Plain-
tiff may pay
Costs, or grant
Imparlanee.

P*ER Cur'*: Upon amending a Declaration, Plaintiff has his Election to pay Costs, or grant an Imparlanee. If he grant an Imparlanee, the Defendant may plead *de novo*, for the Imparlanee sets aside his former Plea: If he pay Costs, he is let in to plead again, so it be some new Matter; for this Reason, because that it might be the Fault, which Plaintiff amends, was the Occasion of his Pleading that Plea; but there he shall not have Liberty to plead the same Plea over again; and if he plead *de novo*, it must be a Plea to stand by; and if he will not plead a new Plea, the old one must stand. After Plea in Bar, one cannot plead in Abatement; and the Amendment and Imparlanee will not let one in to do it.

Change of *Ve-*
nuet.

An *Affidavit* for changing a *Venue* was, that the Cause of Action, if any, did arise in the County of *L.* or in some other, than in that in which Plaintiff laid; and it was insufficient, for it ought to fix it to a certain County; and at this Rate *Venuet* might be changed almost *in infinitum*.

Interrogato-
ries.

When one is put to answer Interrogatories, the Prosecutor has four Days to exhibit, by the Rules of the Court.

Admiralty.
Ante p. 408,
409.
Sailers Wa-
ges.

Per Cur': In respect to Seamen's Wages, the Usage is, if the Ship be lost before Arrival in the Port of Delivery, they lose their Wages out. If she arrive safe in Port, and is lost in her homeward Voyages, they have their Wages out, but lose the homeward Wages. If they run away after Arrival in Port abroad, they lose their Wages.

Gidley versus Williams.

DEBT upon a Bond by Administrator, naming himself Administrator of J. S. deceased, without saying *Bonorum & catallorum, jurium & creditorum*, as the usual Course is, and without saying as much as *cui Administratio commissa fuit*, but concluding *profert in Cur' literas administrat'. Non est factum*, and Verdict for Plaintiff; and moved in Arrest of Judgment, that the Plaintiff had not made himself any Title to the Action. 1st, Because it was not said *Qui obiit intestat'*. 2^{dly}, Not said of what Administration was committed to him, or of what the Plaintiff was Administrator, whether of his Goods and Chattels, Debts, &c. and Administration may be qualified, as of Chattels real only, or Chattel in Possession, and not of Debts; of Debts, and not of Debts by Bond, &c. So it ought to appear what the Plaintiff was Administrator of. 3^{dly}, Not alledged that Administration was committed to the Plaintiff, and by whom. As to the 1st, it ought to have been said *Qui obiit intest'*, or at least, that Administration was committed to him, which strongly implies a dying Intestate; and the Diversity of Entries is observable, when an Action is brought by an Administrator, and when against him; in the one the Allegation is absolute, *qui obiit intest'*; in the other it is qualified, *qui obiit intest', ut dicitur*; and if it be asked, what it is that is the Foundation of this Action, it will be answered to be the original Bond, and the Administration committed to the Plaintiff; and if either fail, the Action must fail: And a Verdict will not help the Want of that which is absolutely necessary to shew Cause of Action, and cannot be Matter of Evidence upon the Issue. And for the Necessity of shewing that Administration was committed to the Plaintiff, were quoted 2 Vent. 84. 1 Sid. 228. But *per Cur'*, after several Arguments, the Defendant, by Pleading in Chief, has cured all the Faults of the Declaration, notwithstanding *Cope* and *Lewin's Case*, Hob. 38. And *Holt* quoted the Case of the Lord *Mohun* and *Archer* in the Common Pleas, Trin. 1657. the Report whereof *penes se habuit*, and belong'd to my Lord *Bridgman*; it was an *Assumpsit* by an Administrator, and no *Profert* of *Literas administrat'*; *Non assumpsit* pleaded, and held that the Fault was help'd after Plea; and the Authority of *Cope* and *Lewin's Case* denied. Vide *Style* 106. *Dennison v. Monson*, where the Pleadings were the same as here.

Salk. 37.
Administra-
tion.Debt on a
Bond as Ad-
ministrator,
not saying by
whom it was
committed,
aided by plead-
ing *Non est
factum*.

Ante p. 436.

2 Cr. 124,
125.Vide 1 Vent.
222. it is but
Form.

here. And after Plea, Plaintiff had Judgment; which was after affirmed upon Writ of Error; and without Doubt, if it had not been aided by the Plea, yet it would have been well by the Statute of 16 & 17 Car. 2. And Plaintiff had Judgment.

Collins versus Benning.

Indebitatus Assumpsit on a Promise to pay on Demand; Statute of Limitations no good Plea.

IN an *Indebitatus Assumpsit*, the Plaintiff declared on a Promise to pay on Demand; and *Non assumpsit infra sex annos* pleaded, to which Plaintiff demurred; because declaring on a Promise on Demand, he thought nothing was due till Demand; and he should have pleaded *Non assumpsit infra sex annos* after Demand, or that no Demand was within six Years. *Per Cur'*: If the Promise were for a collateral Thing, which would create no Debt till Demand, it might be so; but here it is an *Indeb' Assumpsit*, which shews a Debt at the Time of the Promise, therefore the Plea is good. *Jud' nisi pro Def'*.

Sarah Griffith's Case, in C. B.

12 Co. 124.
Dyer 220.
3 Lev. 36.
Skin. 23.
Whether Fines and Recoveries, by Feme Coverts under Age, may be vacated. Notice thereof to be given to a Purchaser.

SEveral Precedents were produced of Fines, Recoveries and Declarations of Uses thereupon being vacated on Motions, because of their being by Femmes Covert under Age. And one of the Rules produced was, that the Feme should not be admitted to levy any more Fines till she came of Age. And another, that the Counsel, who had advised it, should be fined 14*l.* because no Writ of Error could lie. And another, the Husband be fined 100*l.* And in the Case of Sir Robert Marsham, a Six Clerk, procured his Wife under Age to levy a Fine; and being sent for into Court, he was fain to deliver the Fine and Deed of Uses to be cancell'd in Court. And *per Powell*, If the Commissioners, before whom the Fine was taken, knew the Feme to be under Age, they are fineable: But there are no Precedents of *Vacats* of this Kind antienter than 4 *Jac.* 1. But the true antient Way was to bring a Writ of Error; but because the Husband would not join in a Writ of Error, &c. this Way was introduced: And some Books say, that if Feme Covert be outlawed without her Husband, there is no Remedy for her;

her; but now in such Case the Court will discharge her upon Motion. But in this Case there appears that there is a Purchaser, and therefore we ought to be well advised. But in Regard the Feme is to be of Age in two or three Days Time, let us *de bene esse* examine her Age by *Affidavits* and Inspection; and that was done, and the Inspection entered on Record; and the Rule was to see Precedents, and give Notice to the Purchaser.

Feme Covert
outlawed, dis-
charged on
Motion.

2 Vent. 69.
2 Brownl. 279.

The Court will not make a Rule for naming a good Lessor in Ejectment, unless there were a Nonsuit, or Verdict, against Plaintiff in a former Trial.

Ejectment.

Court may grant a Prohibition to a Court pretended; and also where it is doubtful whether it will lie or not.

Ante p. 438.
Prohibition to
a pretended
Court.

Court sometimes will make a Rule on the old Sheriff to indent with his Successor.

*Dominus Rex versus Luellin, Master of the Bell-
Inn in Bristol.*

HE was indicted for not receiving one taken ill with the *Small Pox*; and it was quashed, for not saying he was a Traveller.

Indictment a-
gainst an Inn-
keeper will
not lie, for

not receiving a sick Person, unless it be said he was a Traveller.

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Term. Paschæ,

Anno 13 W. III. in B. R.

Indictment at
Common Law
determines his
Election to
prosecute for it
on a Statute.

IT was moved to quash an Indictment, which was for entering into a Warren and hunting and killing Rabbits at Night. The Exception was, that by the Statute of 3 Jac. i. c. 13. the Offender forfeits treble Damages and Costs, Half a Year's Imprisonment, and to find Security for his good Behaviour for seven Years: And the Indictment not concluding *contra formam Stat.* the Punishment of the Statute cannot be inflicted; and if the Defendant be fin'd upon this Indictment, he may be notwithstanding again punished according to the Statute; and so *bis pro eodem delicto*; *sed non allocatur*, for if one has two Remedies, the one by Act of Parliament, and the other by Common Law, and takes one of them, he thereby determines his Election.

Vide 1 Inst.
145, a. 146. a.

At *Nisi prius* coram Holt.

Joint Traders
are jointly
charg'd, un-
less special A-
greement.

IF there be several joint Partners, and one has Dealing generally with one of them in Matters concerning their joint Trade, whereby Debt is due to him, it shall charge them jointly, and the Survivors of them; but if in that Case one had rather deal with one of them upon his own Account, he must make his Agreement specially, in which Case the Debt shall be only his and his Executors, and shall not survive.

Bankrupt.

If one or more of the joint Traders become Bankrupt, his or their Proportions only are assignable by the Commissioners, to be held in common with the rest who were not Bankrupts.

Commission of
Bankruptcy a-
voids a Judg-
ment after
Bankruptcy
committed.

If there be an Act of Bankruptcy committed, and a Creditor obtains a Judgment subsequent to it, then a Commission is taken out; now the Judgment is thereby avoided.

If there be several joint Traders, Payment to one of them is Payment to all. So if they all, except him to whom the Payment was made, were Bankrupts, the Payment is only unavoidable as to his Proportion; and if there be four Partners, whereof three are Bankrupts, and their Shares assign'd, and a Payment is made to him that was no Bankrupt, it is a Payment to all the Assignees, for now they are all Partners.

A Bill of Exchange was directed to *A.* or, in his Absence, to *B.* and begun thus: *Gentlemen. Pray pay.* The Bill was tender'd to *A.* who promised to pay it as soon as he should sell such Goods; and in an Action against him for Non-payment, the Declaration was of a Bill directed to him without any Notice of *B.* and *Holt* held it well. 2dly, That the Acceptance was a conditional Acceptance. But here the Action being by an Executor, and upon a Debt laid to be due to Testator, he held it necessary to prove that the Acceptance was in the Testator's Time.

Bill of Exchange.

Per Holt: Every Master of a Ship may detain Goods till he be paid for them; that is, for their Freight.

Postea Pasch.
13 W. 3.
Dominus Rex
v. Sims.

Turton versus Reiner.

IF Declaration in Prohibition be by him who sued the Prohibition, and no Plea be put in in due Time, the Plaintiff may have Judgment by *Nihil dicit, ideo stet Prohibitio*; but if it be of the other Side, and no Plea, there shall be likewise a *Nihil dicit*, and a Consultation.

Declaration in Prohibition.

Pickering's Case.

PER Cur': Let the Bail taken by the Sheriff be ever so good, yet the Plaintiff may refuse an Assignment of it, and proceed against the Sheriff by Amercements; therefore it behoves him to take good Bail; it is true the Sheriff shall not be brought in Contempt for not bringing in the Body; but the only Way is to amerce him, and sheriff may proceed on the Bail-Bond: And the Plaintiff, by 23 H. 6. c. 10. has Election of Bail or Amercement.

Assignment of Bail taken by Sheriff, may be refused.

Dominus

Dominus Rex versus Foster.

Appearance to
Indictment is
only to the
End of the
Term; to Ci-
vil Action to
the End of
the Suit.

HE was indicted for a Battery; after Appearance agreed with the Prosecutor, who promised to cease all Proceedings on the Indictment; but notwithstanding, the Defendant not appearing the next Term was sued to an Outlawry. *Holt*: The only sure Way had been, upon Agreement with the Prosecutor, to have submitted to a Fine, which in that Case would have been moderate, or to get a *Non prof.* enter'd. And an Appearance to an Indictment differs from Appearance in a Civil Action, where once an Appearance, it is an Appearance to the End of the Suit; but an Appearance to an Indictment is of Course but of that Term, and then if it be not prosecuted, then the Defendant is out of Court the next Term, and may be outlaw'd; and the Outlawry is a Conviction while it stands unreversed: And your only Way now is to submit to a Fine upon the Outlawry. You might have got an Attorney to appear for you upon the new Act of Parliament.

My Lord Anglesea's Case.

Appearance
for keeping
the Peace, not
discharged till
End of the
Term, unless
Attorney Ge-
neral desires it.

HE stood upon his Recognizance for his keeping the Peace towards his Lady. And it was moved to have his Attendance discharged in Regard of his ill State of Health, he spitting Blood, and advised to go beyond Sea for his Health. *Per Cur'*: By the Course of the Court one is never discharged so till the last Day of Term, without the Attorney General comes and desires it; tho' it may absolutely be done, his Attendance being *de die in diem*; and ordered them to produce Affidavits of the Truth of what was offer'd, and to move it again.

Willmott versus Tiler.

Appeal.
Pray'd his
Clergy, which
was allow'd,
and burnt in
the Hand.
Ante p. 416,
417.

BEing arraigned on the Appeal before, and having had Time to plead, he was committed, as before is said; and being brought in at another Day, he put in his special Plea, and was remanded: And at another Day it was made a *Concilium* in his Absence, which might well be, because it was only to assign a Day for Counsel to argue the Point.

And now it appeared on Oyer of the Writ, there were not fifteen Days between the Teste and Return thereof; so the Plea was, *protestando* that the Appellee ought not to answer the Writ for Want of sufficient Number of Days between it's Teste and Return; *pro placito dicit*, and sets forth the Indictment before the Grand Jury, &c. and a *Capias* thereupon at large directed to Sheriff of *London*, by Virtue whereof he was taken, &c. That at the Gaol-Delivery of *Newgate*, at the *Old-Baily* Justice-Hall in *Paroch*, &c. *London*, *coram* such and such *Just. ass. et sociis suis*, *Just.* of Gaol-Delivery of *Newgate*, the Indictment was delivered in. And that he the Appellee was by the Sheriff of *London* brought into Court, and sets forth his Arraignment, and Plea of Not guilty *per Patriam*; that a Jury was then and there impanell'd, *viz.* A. B. &c. That the Jury found him guilty of Manslaughter; that he was immediately ask'd what he had to say why Judgment should not pass; that he pray'd his Clergy, which was allow'd him; that he then and there read as a Clerk, and was burnt in the Hand, and confin'd eleven Months by the Court; and avers Indentity of Persons, Wound, &c. and so concludes that he ought not to be put to answer again. To this a Demurrer, and Joinder in it.

1st. It was objected, That it appeared that the Judges, before whom the Trial was, were Judges of Gaol-Delivery of *Newgate*; and it does not appear the Defendant was in the Gaol of *Newgate*.

Resp. That Objection would destroy all Proceedings at the Gaol-Delivery; the Indictment is found before Justices of the Peace, and by them sent to the Justices of Gaol-Delivery; and the Commission runs for Justices of Gaol-Delivery for *London*, and another for *Middlesex*. And the Current of Precedents is, that the Party came in in Custody of the Sheriff, *cujus custodia ex causa præd. commiss. fuit*; and since he says he was in Custody of Sheriff of *London*, and since *Newgate* is the County Gaol both of *London* and *Middlesex*, we shall intend him in the Sheriff's Custody in *Newgate*, as by Law he ought to be: And we must intend *Newgate* to be the County Gaol, for that it does not appear to be a Franchise; and that Objection has been frequently over-ruled. Ante p. 1146.

2. *Obj.* The *Old-Baily*, where the Court is said to have been kept, is said to be *in parochia*, &c. *in warda Farringdon extra London*, which is Nonsense.

Resp. Ward of *Farringdon extra* is the Name of the Ward, and *extra* does not denote it to be out of the County of *London*, but is for Opposition to *Farringdon* within the City Walls.

3. *Obj.* Justices of Gaol-Delivery cannot try any Indictment but what is found before themselves.

Resp. It was so at Common Law, but altered by the Statute.

4. *Obj.* The Verdict as pleaded is contradictory, for they say he was acquitted of the Felony and Murder, and after that he was found guilty of Manlaughter, which is Felony.

Resp. That might have been said better; but it must be understood, that they found him not guilty of the Felony and Murder *prout*, but guilty of Felony and Manlaughter.

Then it was insisted on, That tho' the Writ were naught, for the want of the due Number of Days between the Teste and Return, yet now the Defendant not having pleaded it in Abatement, but taken it by a *Protestando*, he had waved the Advantage of it.

But to that it was answered of the other Side, That since it appeared to the Court by the Oyer on Record to be vicious, they must, *ex officio*, take Notice of it.

Then it was insisted on, That by pleading in Chief he had admitted the Writ good; for if he had pleaded in Abatement, he should not plead in Chief till the Matter in Abatement were determined; for by pleading in Chief at the same Time, he would have waved the Abatement; and for this 7 *Ed.* 4. 15. *a.* was strongly insisted on. But *Note*; That Book only says, that where he pleads such Matter in Abatement, which denies the Appellant's Right of Appeal, as that he is a Bastard, or that another is Heir; he ought not to plead in Chief, because such a Plea would admit him capable of suing contrary to the Plea in Abatement; but in that very Case, by the Serjeants at Bar, he may plead over *in favorem vite*. And so the Court held here, was the constant Course for Expedition; and the Book of 7 *Ed.* 4. 15. agrees he ought to plead over, where he does not deny the Appellant's Title to the Action, which is not done here.

Obj. This Trial was now above a Year ago; and they conclude *prout patet per Record* in the *Old-Entry*, whereas by an Act of Parliament all the Records of Gaol Delivery are to be removed into the Exchequer, into the Custody of the

Trea-

Treasurer; and tho' a Record be not local in itself, yet if they plead it in a certain Place we may traverse it.

Holt: Suppose they do not remove the Record, shall that turn to the Prejudice of another? And that Act of which you speak is grown obsolete, for indeed they do for the most part remove them into this Court; and if you pleaded *Nul tiel Record*, a *Certiorari* would go to the Judges of Gaol-Delivery; and if they did not certify a Record, then it were for your Advantage. And he remembered a Case of Appeal, where the Appellee pleaded a false Addition in Abatement, *viz.* that he was an Inhabitant of *A. absque hoc*, that he was an Inhabitant at *B.* as it was laid, and he was order'd to answer over to the Charge; and tho' he might have pleaded a Conviction of Manlaughter, and Allowance of Clergy, yet to lie open to the Appeal he pleaded Not guilty. And it came to Trial on both Issues; and as to the Issue of Not guilty, he was found guilty of Manlaughter; and the other found specially, that the Appellee was accidentally at *B.* and not otherwise an Inhabitant there; and so the Question was, whether he could be said to be an Inhabitant at *B.* but that Point never received any Determination; but the constant Practice is to lay him an Inhabitant where the Fact is committed. And in Favour of Life he may plead a special Matter in Bar, and Not guilty too; but for Expedition's Sake, if he plead in Abatement, the Court will make him plead in Bar besides; and the being of Oyer of the Writ, makes it Part of the Record. And *per totam Cur'*, the Conviction of Manlaughter and Clergy is a good Bar of the Appeal, without Dispute; but the only Doubt is, whether we shall give Judgment on the Writ, or on the Plea in Bar; for if we give it on the Bar, and the Writ be insufficient, our Judgment will avail nothing, according to *Vaux's Case*, 4 Co. for it will be no more than an Acquittal upon a bad Writ, and then they may arraign him again; and tho' *Vaux's Case* be after Verdict, and this upon a Demurrer, that makes no Difference. But *per Holt*; if *Vaux's Case* were *res integra*, it would deserve Consideration.

And at another Day, *per Cur'*, *Holt* delivering their Opinion; We all agree that Judgment final ought to be given: For, tho' clearly the Writ is bad for want of fifteen Days between the Teste and Return, so as if *Non est invent.* had been returned, and the Defendant sued to an Outlawry, it had been erroneous; yet since he appeared to it, and pleaded in Chief, he has lost that Advantage; for the Reason why there ought to be fifteen Days between the Teste and Return

Tho' the Writ be bad by pleading in Chief, the Advantage is lost.

turn appears upon Consideration of the Statute of *Articul' super chartas*, c. 5. 2 *Inst.* 567. by which Statute it is necessary there should be fifteen Days between the 'Teste and Return of Writs; and thus it was anciently, for they computed one might travel twenty Miles a Day, and therefore they held fifteen Days Journey sufficient to come from any Part in *England*, and for this a Day's Journey was called *Dieta. Brit. lib.* . f. 135, & 138. And the Reason was that Party might have sufficient Time to appear and prepare an Answer; and if the Process was too streight, it was erroneous; but if the Defendant, by appearing and pleading in Chief, dispenses with this Favour, he may, and thereby make the Writ good. 9 *Ed.* 4. 18. 12 *Ed.* 4. 11. *Sci. Fa.* upon a Fine wanted the due Number of Days between the Teste and Return, and that Writ did partake of the Nature of a Real Action; yet if Party appear'd and pleaded to it, it made it good. If Writ of Covenant to levy a Fine want fifteen Days between the Teste and Return, yet if Party appear, and Fine be levied, it is good. This indeed has been after questioned by some Judges, but was adjudged to be a stated Doctrine, and needs no new Settlement; for if the Defendant appears and answers, without taking Advantage of this Fault of the Writ, as if it were in Assize, and he not attach'd fifteen Days before, the Fault of the Writ is thereby cured. *Et sic per Cur' Jud. pro Defendente* upon the Plea in Bar.

Vide 1 Vent.
7.

Notwithstanding the Appellant's Counsel moved *instante* for Leave to charge the Defendant in Custody of Marshal, the Judgment being in Bar upon a bad Writ, according to *Vaux's Case*, 4 *Co.* at which the Court was very angry, for it was to arraign their Judgment to their Face, but said they could not help it; and the Motion was granted, but *materia dormivit*.

Clerk not to
be burnt in
the Hand.

18 El. c. 7.

Note; *Holt* occasionally in this Case said, that a Clerk in Orders, upon his having his Clergy, shall not be burnt in the Hand; and none could have the Benefit of his Clergy twice except a Clerk. In all Cases before 18 *El.* where Clerk had Clergy, he was delivered to the Ordinary, but in no Case since. And where one in Orders has his Clergy, there ought to be a special Entry made why he was not burnt in the Hand; and if he be Clerk in Orders, or not, is triable by his *Ordination*. And if a Clerk shew his Ordination, he need not have the Book, because it is presumed a Clerk in Orders can read. And in the Time of *Ed.* 3. Clergy was denied to one not having *habitu et tonsuram*.

By 1 Ed. 6. c. 12. § 14. Peers to have Benefit of Clergy without burning in the Hand, tho' cannot read.

Anonymus.

REplevin by Plaint in an inferiour Court was removed hither by *Certiorari*; and upon the Removal the Plaintiff changed his Declaration. *Per Cur'*: That cannot be, for whatever is below ought to be now here. And if one remove a Replevin by *Recordare* hither, and declares for less than he took, the Defendant must avow for them, and also for what he has not declared on; and if he has Return, he shall have it for all. And if one replevies Part of the Goods taken, the other shall avow for them and the rest also, and have Return if his Avowry go for him for all. And this *Certiorari* removes the Pledges below, so as *Sci. Fa.* may go against them. And the Entry here above, in this Case of Removal of Replevin by Plaint, ought not to be of a *Summonitus fuit*; as upon an Original, but as of a Cause removed.

On Removal of Replevin into B. R. by *Certiorari*, the Declaration cannot be changed.

3 Mod. 58.

Ante p. 430.

Dominus Rex versus Ford.

HE was convicted in a Summary Way on the Statute of Deer-stealing. To which it was objected, 1st, That it did not appear on the Record, that the Defendant had any Notice to come and make his Defence; and *citatio est de jure naturali*, that none be convicted without an Opportunity of making Defence; *quod Cur' concessit*. But this being by Persons by Law intrusted with the Administration of Justice, we will intend they have proceeded regularly and legally; if the Contrary appear not. 2^{dly}, Not shewed to be the Offence described by the Statute; for it is not said that Deer were usually kept there for ten Years before. *Per Cur'*: If that be notoriously known, it need not to be aver'd. 3^{dly}, It is said we kill'd the Deer, without Consent of the Owner, on such a Day; so they tie up the Want of Consent to the Day, and that is ill, for the Consent might have been given the Day before to kill the Deer the next Day, and then it would be a lawful Killing, tho' in Strictness without the Owner's Consent on that Day. But *per Cur'*, a Consent to Day to kill a Deer any Day for a Month, is a Consent for every Day till it be executed or revoked, which cannot be

Conviction for Deer-stealing.

till Notice. *Lastly*, It was moved to stay the Affirming the Conviction, because there was an Information for Perjury against the Witness on whose Oath it was, till that were tried. *Sed nihilominus* it was confirmed.

Kilderton versus Wilkenſon.

Rule to Return a Writ, not to High Sheriff.

AN Under-Sheriff return'd a *Fi. Feci*, and a *Venditioni exponas* sued out, after two or three Rules upon the Sheriff to make a Return, and Failure therein; an Attachment was granted against him; the Court declaring they never would grant it against the High-Sheriff for not returning the Writ. And such a Rule the same Term in the like Case against the Under-Sheriff of *York*.

Pocock versus Thornicroft.

Information.

Ante p. 340.

London, the real Record not removed from thence.

LEave was granted to file an Information against the Defendant for inveigling away the Plaintiff's Wife, and procuring Merchants and Tradesmen to sell her Goods, in order to saddle the Husband with the Debt, agreeing with the Seller to deliver him the Goods again. *Note*; A Wife shall be admitted to swear the Peace against her Husband, because a Matter concerning her Person.

Per Cur': When a Cause is removed from *London*, the very Record is never removed, because they expect a *Procedendo*.

Per Cur': One has four Days to move in Arrest of Judgment after the coming in of the *Postea*; but Defendant at his Peril must watch its coming in.

Mason versus Atherbury.

HE gave a Bond for his true Imprisonment, and after escaped, and the Marshal assigns the Bond to the Plaintiff, who sues it to Judgment; the Obligee brings in the original Defendant, and the Marshal accepts him; and *per Cur'*, he by the Acceptance has dispensed with the Forfeiture of the Bond.

Per Cur': If Justices of one County make an Order for the Removal of a poor Person into another County, the Appeal belongs to the Justices of the County where the Order was made. And if Orders be removed hither, and before it be quash'd the Justices make a new Order, it is a Contempt; and the Order is not quash'd till a Rule be absolute.

Thorp versus Thorp.

ERror from Common Pleas of a Judgment in Case, where- Salk. 171.
in the Plaintiff declared, that the Defendant had and 1 Vent. 177.
held of him, by Way of Mortgage, two Closes of Copyhold- 214.
Lands; and that there was a Discourse between them con- Condition
cerning the Plaintiff's Releasing his Equity of Redemption precedent.
therein to the Defendant, and concerning divers Sums of Money due from the Plaintiff to the Defendant upon the said Mortgage; upon which the Plaintiff did agree with the Defendant that he would release to him the said Equity of Redemption, in Consideration of which the Defendant did agree with the Plaintiff to pay him seven Pounds above all that was due; and that, in Consideration that the Plaintiff promised the Defendant to perform all of his Side, the Defendant promised the Plaintiff to perform of his Side; and avers that he did perform all on his, the Plaintiff's Side, but that the Defendant paid one Pound seven Shillings of the said seven Pounds, and no more, &c.

To this the Defendant pleads in Bar, that long after the Promise, viz. 29 July 1694, the Plaintiff did, by Indenture made between him and the Defendant, release to the Defendant all Manner of Actions, Suits, Debts, Duties, Sum and Sums of Money, and all Demands whatsoever, which ever he had, or he, his Heirs, Executors or Assigns ever should have, for or by Reason of any Thing, Matter or Demand whatsoever. Upon Oyer of this Deed of Release, it did recite the said Mortgage, and released all Provisoos therein, and all his Estate, Right, Title and Interest in the said Close, both in Law and Equity; and then follows the foregoing Clause. And upon this the Plaintiff demurrs, and Judgment for the Plaintiff in *C. B.*

Cowper for the Plaintiff in Error objected to the Declaration, That the Consideration set forth in it was not sufficient to support a Promise; for tho' Equity of Redemption be a Thing

Thing pretty well known, and for the most part valuable, yet some may be not of any Value, and this may be of them; and therefore it was necessary to shew that it was of some Value; and for an Example of an Equity of Redemption without Value, he put this Case: If Mortgage be till so much Money be raised by Mortgagee out of the Profits; here the Mortgager has an Equity of redeeming by Payment of the Money and Charges, and yet it is of no Value to the other to have it released; but to the Contrary, the Redemption there would be rather a Benefit to him.

Also he objected, That it did not appear by the Count that the Mortgage was forfeited, and then the Plaintiff had no Equity of Redemption. *Ergo* no Consideration for the Promise, *Ergo*, &c. *Vide 2 Saund. 136. Style 248.*

Then the Plea in Bar is good, for the Release is full in Words, and subsequent to the Promise. But say they, the Money was to be paid in Consideration of the Release; therefore the Release, which created the Duty, cannot *in eodem instanti* extinguish it. To this I answer, That the Payment of the Money does not arise from the Release, but from the Promise; and the Promise, and not the Release, being the Consideration of the Debt, Action lies upon the mutual Promises before the Release. *Ergo* the Release comes after the Cause of Action, and consequently destroys it. *March 75.* Where Promises are their own mutual Considerations, there needs no Performance to support the Action. *Hob. 88.* In Consideration that Plaintiff promised to deliver the Defendant a Cow, the Defendant promised the Plaintiff fifty Shillings; in an Action for the Money there needs no Averment of Delivery of the Cow, or *vice versa*. *Cr. El. 343.* Declaration, 'That in Consideration *A.* was indebted to *B.* by Bills, and that he promised to deliver him up the Bills, he promised to give him good Security by Bond for the Money, and avers the Delivery of the Bills; the Defendant traverses the Delivery, and on Demurrer adjudg'd against him, because not material; and it was not the Consideration of the *Assumpsit*, but the Promise to deliver was it. *Cro. El. 704. simile.*

But *Cro. El. 889.* The Promise is, *super solutionem* of such a Sum, to do, &c. therefore the 'Thing not demandable before Payment. So is *Cro. Ca. 19.*

So that if here the Cause of Action did arise upon the Promise before any Release made, the Release subsequent clearly discharges it; *secus* not if there were no more in the Case.

And if the Release be what gives them Cause of Action, then they should shew a Release made, or a Tender of it; and not generally, as here, that they have performed all of their Side.

But it is objected, that altho' an Action had accrued to the Plaintiff immediately upon the Promise, yet this Release should not discharge it; for that the Release shall be taken according to the Intent of the Parties, which was only to discharge the Equity of Redemption; and the general Words of it shall be restrained and qualified by the foregoing special Words.

Vide 1 And.
64.
3 Cr. 182.
Hetley 15.
9 Ed. 3. 43.
2 Ro. Ab. 393.
Hob. 74.
Dy. 240.
2 Ro. Ab. 396.
Hob. 275.

Ans. w. After releasing the Equity of Redemption by express Words, there are in the self same Clause general Words of all Actions and Demands, which I agree are qualified by the special Words and Intent of the Parties. And then comes the Clause in Question, distinctly and separately from the first, releasing all Actions and Demands; and this Clause would be intirely useless, if they be applied to the first; because the first has a general Clause in it self to serve it as a Wall or Muniment, and so stands in no need of any more. 2 *Rol. Ab.* 489. The general Words, that are restrained by the special Words, are Part of the same Clause and Sentence, and not, as here, distinct and separate. 3 *Mod.* 277. And suppose *A.* recited in a Deed, that whereas *B.* owes him 10*l.* and releases thereby the said 10*l.* and all Actions and Demands; and further proceeds, and releases him all Debts, Duties, Actions and Demands; would this last Clause be rather intirely rejected, than extended to any Thing but the 10*l.*? and upon this Diversity, *Hetley* 9 & 15. *Aubry's* Case is distinguishable from the present Case.

Cheshire cont. As to the Want of averring that we have made a Release, they in their Replication shew that we have done it, and set it forth, and that supplies that Defect, if any; for many Times the Fault of a Declaration may be help'd by the Defendant's Plea; as the Want of a *Venue* by Pleading a Release. *Cr. El.* 68. Debt upon a Bond, and it did appear by the Bond, that the Day of Payment was not yet come. Defendant pleaded a Release, and found against him, and Plaintiff had Judgment, for that by Pleading the Release he waved the other Advantage; and 9 *Ed.* 4. —. there cited; Debt by Executor, Defendant pleaded the Testator had made two Executors, and that one of them released to him; and Issue thereupon found for the Plaintiff, who had Judgment, tho' the Defendant might have

abated the Action; because he waved that Advantage by his Plea. 3 *Cr.* 111. 2 *Keb.* 766. 1 *Vent.* 114, 126.

And this Court will take Notice what an Equity of Redemption is, as well as a Court of Equity, of Trusts and Mortgages. 4 *Leon.* 225. 1 *Vent.* 41. That the Court will take Notice of an equitable Consideration; and we need not shew what our Equity of Redemption was, or how created. For 1st, they requested we should release such a Thing to them; and it cannot be imagined they would do so, if we had none. Indeed, if it had appeared to the Court that our Equity was of no Value, it would have been the stronger against us; tho' even so, there being something to be done by us, that would be a Trouble to us, it would have been a good Consideration of a Promise. And if, in the Case quoted out of *Saunders*, the Heir had recited, that he was bound by the Bond, the Court would intend it so, and give Judgment against him. And in all the Cases, that have been put of the other Side, it did appear to the Court, that there was nothing of Value, or any Pain or Trouble to the Plaintiff, to be the Consideration of the Promise; and there is a Diversity between a Thing's appearing not to be valuable, and its not appearing to be valuable; for a Recital of it will help it in the one Case, but not in the other. *Raym.* 19. To make a Promise good, the one Party, viz. he that does promise, ought to have some Charge or Trouble by the Performance, or the other some Advantage.

Vide Cr. El.
837.
19 H. 6. 62.

And the Words of Release are not sufficient to discharge the Promise, because it was not in Demand at the Time of the Release; for the Release was a Condition precedent, whereupon the Demand did arise to the Plaintiff; and therefore the Release could not destroy that to which it gave Birth.

But suppose an Action did arise upon the mutual Promises, yet each Party had a reasonable Time to perform; and perhaps each had Time for his Life, if not hastened by Request, and neither is alledged here. Indeed the Promise, as soon as made, was releasable by the Word *Promise*, but not by the Words *Actions* or *Demand*, at least till a convenient Time after; which is not alledged to have been between the Promise and Release.

And it is not absolutely necessary the Words insisted on in this Release must be rejected as fruitless, without they are extended to release this Demand; for it may be, the Mortgagee might be accountable to the Mortgagor for some

of the Profits of the Lands, which might be released by the Words.

Holt: A Release of an Equity of Redemption is a good Consideration for a Promise; and we can take Notice of an Equity of Redemption, and that it is a valuable Thing. But suppose it were not a Thing valuable, and the Case were this; *A.* is possessed of *Black-Acre*, to which *B.* has no Manner of Right, and *A.* desires *B.* to release him all his Right to *Black-Acre*, and promises him, in Consideration thereof, to pay him so much Money, sure this is a good Consideration, and a good Promise, for it puts *A.* to the Trouble of making a Release; then where the doing a Thing will be a good Consideration, a Promise to do that Thing will be so too; and tho' the Want of Averment, that a Release was made, would have been bad, if demurred to, yet it is now help'd by going over and Pleading. If one covenants to do several Things in a certain Deed agreed on, and in the End binds himself in a Penalty for so doing, and Debt is brought for the Penalty, and shews generally, that he has done nothing of what is agreed on; this would be bad on Demurrer, but a Plea over cures it. So if one covenants, that if *J. S.* does such and such Things, that he will pay him so much Money, *J. S.* brings Action, and says generally that he performed all the Things; this would be bad on Demurrer, but cureable by pleading over. Indeed, this being a general distinct Clause seems to diversify this Case from all the Cases before put, where the general Words, restrain'd by the precedent particular ones, are in the same Clause with the Particulars.

Release of an Equity of Redemption is a good Consideration of a Promise.

Where the doing a Thing will be a good Consideration, the Promise of doing it will be so.

And at another Day this Term, after great Consideration, the whole Court came to one Resolution, which was thus delivered by *Holt*:

We all agree, that the Promise was not discharged by this Release. It was urged at the Bar by Mr. *Cowper*, that if the Plaintiff might have founded an Action upon the mutual Promise and Agreement, before any Performance on his Part, that certainly this Release would have barred him; and the Consequence is very true and necessary, if that were the Case. And by the same Reason, if he could not bring an Action before such Time as he had made a Release, there is no Colour for the Release to bar him; for till he makes the Release in this Case, if he has no Title to the 7^l. then till Release there is no Right of Action; and then they do not lie in Demand till Release; and that a Release of all Demands will not release a Thing that does not

Release will bar an Action where are mutual Promises, before Performance.

Release of all Demands will not release a Thing, which at the Time of Release is not demandable.

Where the Promise is executory, it is a Condition precedent.

If one is to do a Thing for which another Thing is to be done, it is a Condition precedent.

not lie in Demand at that Time, *vide* 2 Cr. 171. 5 Co. Hoe's Case. A Release to Bail in the King's Bench before Judgment against the Principal, not good; because till then the Cause of Action is uncertain, and therefore not demandable. So the whole Question will be here, whether the Plaintiff could have an Action before the Release. And as to that it has been urged, that in this Case there were mutual Promises, and the one Promise is the Consideration of the other; and that then he that brings the Action needs not aver any Performance of his Side; and this likewise would be a true and necessary Consequence, if the Premises were true. But where the one Promise is the Consideration of the other, and where the Performance, and not the Promise, is it, is to be gathered from the Words and Nature of the Agreement, and depends intirely thereupon; for if in this Case there were a positive Promise, that one should release his Equity of Redemption, and on the other Side, that the other would pay 7*l.* then the one might bring his Action, without any Averment of Performance; but this Agreement is not so; but that the Plaintiff should release his Equity of Redemption, in Consideration whereof the Defendant was to pay him 7*l.* so that the Release is the Consideration, and therefore being executory is a Condition precedent, which must be averred. And whereas there seems to be a Variance in the Books upon this Learning, it will be fit on this Occasion to settle it; and I agree the Case in *Hob.* 58. to be good Law; for there is a positive Agreement that one shall deliver a Cow to the other, and that the other shall give him so much Money, and therefore the Action lies for either Side, without Performance of his Promise; but if by the Agreement *A.* were to deliver *B.* a Cow, and that for it *B.* were to deliver him a Horse, there the Delivery of the Cow would be a Condition precedent, and therefore ought to be performed before *A.* can bring his Action; and upon this Diversity the Books are reconcilable. 15 *H.* 7. 10. *pl.* 17. If *A.* covenant with *B.* to serve him for a Year, and *B.* covenant with *A.* to pay him 10*l.* there *A.* shall maintain an Action for the 10*l.* before any Service; but if *B.* had covenanted to pay 10*l.* for the said Service, there *A.* could not maintain an Action for the Money before the Service performed. And there is great Reason for this Diversity, for when one promises, agrees, or covenants to do one Thing for another, there is no Reason he should be obliged to do it, till that Thing, for which he promised to do it, be done; and the Word *for* is a Condition precedent in such Cases.

Cases. But upon this Head some Diversities are to be observed.

1st, If there be a Day set for the Payment of Money, or doing the Thing which one promises, agrees, or covenants to do, for another Thing, and that Day happens to incur before the Time the Thing for which the Promise, Agreement, or covenant is made, is to be performed by the Tenant of the Agreement; there, tho' the Words be, *that the Party shall pay the Money, or do the Thing for such a Thing, or in Consideration of such a Thing*, after the Day is past the other shall have an Action for the Money, or other Thing; altho' the Thing, for which the Promise, Agreement, or Covenant was made, be not performed; for it would be repugnant there to make it a Condition precedent; and therefore they are in that Case left to mutual Remedies, on which, by the express Words of the Agreement, they have depended. *Vide 48 Ed. 3. 2. 3. cited in Ughtred's Case, 7 Co.* where the Diversity is taken, when there are mutual Remedies, and not; it is thus put in that Book: Sir R. P. covenants with Sir R. T. to serve him with three Esquires in the Wars of *France*; Sir R. T. covenants, in Consideration of those Services, to pay him so much Money; and there it is said, Action will lie for the Money without any Services performed. But if you look into the Book at large, you will find it was upon the Diversity which I have taken; for the Case in 48 *Ed. 3.* is, R. P. covenants with R. T. to serve him with three Esquires in the Wars of *France*, and R. T. covenanted with him to pay him so much Money for the Service; and it was further agreed, that twenty Marks of the Money should be paid in *England*, at a Day certain, before they went for *France*, and the rest by quarterly Payments, which might likewise incur before the Service. And upon Action brought by Sir R. P. it was objected, that the Service was not performed; but there was no Room for that Objection upon the Diversity which I have taken; the Money, by the Agreement, being made payable at a Day certain, before the Service was to have been performed. 1 *Vent.* 147. Covenant, that in Case A. would let B. enjoy Land for a certain Term of Years, for the Injoyment he would pay him so much Money before the Expiration of the Years. 3 *Leo.* 156. Covenant to pay so much Money, the other making him a good Estate in such Lands; held the making the Estate to be a Condition precedent, and therefore to be averred. 1 *Saund.* 319. is upon the same Diversity: An Agreement was to let

But if it be to be done at a Time, before which the other is to be done, it is not a Condition precedent, but Parties must have mutual Remedies.

a House to the Plaintiff, with certain brewing Vessels; Plaintiff covenants to pay so much Money for it before *Midsummer*-Day; and here, because a Day certain was appointed for the Payment, tho' no Assurance was made of the House, &c. yet an Action lay for the Money. If *A.* covenants to make an Assurance of Lands to *B.* who covenants to pay him 10*l.* in Consideration thereof; there he is not bound to pay the Money before the Assurance made; but if he had covenanted to pay the Money, in Consideration of the Covenant to make the Assurance, he would be liable to an Action immediately.

Where it is a Condition precedent, the doing it must be averr'd, to maintain an Action.

2*dly*, If there be a Day for the Payment of the Money, or doing of other Act *for* another, and that Day is to be after the Performance of the Thing *for* which the Promise, &c. was made, there, if the Agreement be to pay the Money, or do other Thing, (*for*) or (*in Consideration*), or such other Words that would make a Condition precedent, there such Things, for the doing or performing of which the other agrees to pay the Money, or do other Thing, must be averr'd, to maintain an Action; and for this Sir *W. Jones* 318. The Executor of *A.* brought an Action of the Case against *B.* declaring, that in Consideration *A.* in his Life-time did promise to assure certain Lands to *B.* before *Mich.* next, *B.* promised to pay him so much Money for the Land; so the Assurance was to be made before *Michaelmas*, and the Money was to be paid for the Land, and consequently after *Mich.* for *A.* had Time till *Mich.* to make the Assurance; and because the Assurance was to have been made first, and the Money by the Agreement to be paid for the Land, tho' there were mutual Promises; yet it was adjudged the Action would not lie for the Money, without making the Assurance first. This Case, as it is there reported, is intricate, and requires Consideration to make this Construction upon it; but upon Examination it is a full Authority in Point. *Dy. 76. pl. 3.* *A.* agrees to deliver *B.* a Hawk at *Midsummer*, for which he agrees to pay him a Horse at *Mich.* there if a Hawk be not delivered at *Midsummer*, there shall be no Horse delivered at *Mich.* nor any Remedy for it.

Ughtred's Case has afforded a Ground for a Variety of Opinions upon this Question; but such, as seem against these Diversities laid down by me, shall receive a full Answer; and in 1 *Rol. Ab. 414.* are several Cases which have been urged against me; the first is said to have been *Mich. 7 Jac.* and it was a Charter partite between *A.* and *B.* by which *A.* covenants to go a Voyage, and take in several Ladings at several

veral Ports beyond the Seas, and return with them home; *B.* covenants to pay *A.* for all that Voyage 147 *l.* at a Day, *whether after or before the Voyage is left in Doubt by the Book.* And there it was adjudged, there might have an Action lain for the Money, without Averment of Performance of the Voyage; and this seems an Authority in Point against me: But first, it does not appear there but that the Day of Payment was before the Voyage performed; but a full Answer to it is, that there was a Writ of Error brought, and that Judgment reversed for Want of an Averment. *Vide 3 Bulst. 147. Rolle* reports the Judgment in the Common Pleas 7 *Jac.* but it seems had not seen the Reversal thereof, which was 9 *Jac.* two Years after, as it is in *Bulstrode*; where it is adjudged, that *pro tota transfretatione* is a Condition precedent, and that its being in mutual Covenants makes no Alteration.

Then there is 1 *Rol. Ab. 415.* said to be *M. 15 C. 1.* and it seems also against me in Point; there were Articles of Agreement made by *A.* in Behalf of *B.* of the one Part, and *C.* of the other Part; wherein it was covenanted by *A.* that *B.* for Consideration hereafter expressed, should convey certain Lands to *C.* *C.* on his Part, for the Consideration aforesaid, covenanted to pay *B.* 166 *l.* and it was adjudged that the assuring the Land was not a Condition precedent. But this Case does not come up to ours; for there is an exprefs Covenant, that (for Consideration hereafter expressed) *B.* would convey to *C.* and *C.* (upon Consideration aforesaid) covenants to pay the Money; and that must be for as much as *A.* hath covenanted that *B.* should assure Lands for Consideration hereafter mentioned, that is, that *B.* hath covenanted to pay so much Money; for it is *pro consideratione predicta*; and the Question is, what is meant by the Words (*pro consideratione præd.*) it is not said, for Consideration of Conveyance of the Land, but *pro consideratione præd.* which must be understood, in Consideration of the Agreement that *B.* Vide 1 Vent. should convey, &c. for the one covenants for Consideration ^{41.} hereafter mentioned, which must be the Covenant for Payment of the Money; and the other covenants for Consideration aforesaid, which must be that *A.* covenanted that *B.* should convey.

But I must needs say there is another home Case; it was also in the Time of King *Ch. 1.* and it was on mutual Promises to stand to an Award between *A.* and *B.* and laid in Consideration *A.* on his Part did promise to stand to the Award, *B.* on his Part did promise to stand to it; and the Award

ward was made that *A.* should pay *B.* 10*l.* in Consideration whereof *B.* should enter into an Obligation to release unto *A.* all Actions; *A.* brings an Action against *B.* for not entering into the Obligation according to the Award, and he did aver, that he had done all on his Part, but that *B.* had not entered into the Obligation; and the Exception was taken, that there was no Averment of the Payment of the 10*l.* in Consideration whereof he was to have entered into the Bond; but it was said, there needed no Averment; and this is full against me. But *Rolle* himself there says the Court were divided. And 1 *Cr.* 384. gives a quite contrary Report of the Case, and says, *Jones* and *Berkely* held it a Condition precedent, against *Croke*; so I rather believe *Croke*, who was one of the Judges, and tells you himself was of a contrary Opinion. And as to *Haye's* Case, which is also in 1 *Rol. Ab. ubi supra*, it is reported 1 *Cr.* 433. and it has no such Point in it. These Authorities therefore are well answered.

There are some other scattered Authorities, in the Books, of this Kind. But let us now see the Reason of the Thing. What is the Reason that mutual Promises shall bear an Action without Performance? One's Bargain is to be perform'd according as he makes it. If he makes a Bargain, and relies on the other's Covenant or Promise to have what he would have done to him, it is his own Fault: If the Agreement be, that *A.* shall have the Horse of *B.* and *A.* agrees that *B.* shall have his Money, they may make it so; and then there needs no Averment of Performance to maintain an Action on either Side; but if it appear by the Agreement, that the plain Intent of either Party was to have the Thing to be done to him perform'd, before his doing what he undertakes of his Side, it must be then averred. As where a Man agrees to give so much Money for a Horse, it is plain he meant to have the Horse first, and therefore he says the Money shall be given for the Horse. And it would be very dangerous to make every cursory Agreement of Parties to amount to mutual Promises, to bear an Action without Averment of Performance: And therefore if two meet, and the one has a Horse to sell, and the other would buy one, and they agree on the Price, and then part without any Earnest, or reducing the Matter solemnly into Writing, there, tho' there be no Words of Condition precedent, such cursory Agreement ought not to be admitted as Evidence of a mutual Agreement; and it ought not to pass for a Contract, but rather for a bare Communication. *Vide Dy.* 30, —, 24. *Style* 32. But if there be a solemn Transaction, as Writing,

as that *A.* would deliver his Horse to *B.* and no Time appointed, and that *B.* should pay so much Money to *A.* there, if there be not the Word (*for*) or other Words of Condition precedent, a mutual Action will lie, without Averment of Performance; but if it be only a Discourse, without the Solemnity of Writing, Earnest, &c. it ought not be allowed.

There is a Case in 2 *Mod.* 33. In *Assumpsit*, the Plaintiff declared, that in Consideration that he promised to assign to the Defendant his Interest in certain Land, the Defendant promised to pay him *proinde* so much Money, and averred that he offer'd to assign the Interest; but that Matter being not well pleaded, the Question was, whether it was necessary to aver Performance; and held, on the Reason of *Ughtred's* Case, that it was not. And this will be a Light to the Reasons of *North* and *Wild* there. *Vide Style* 186. Covenants were between *A.* and *B.* that *A.* should bring 500 Soldiers to such a Place, by a Day certain, to be transported; and that *B.* should attend there then with Ships to transport them, and both Parties fail'd; and the Question was, whether, tho' *A.* had brought no Soldiers, *B.* had broke his Covenant, in not being ready with Ships; and held, that *B.* had broke his Covenant, tho' *A.* had not brought the Soldiers. But this differs from our Case; for there are two distinct Acts to be done, one is to be ready with the Soldiers, and the other with Ships; and the Performance of the one does not depend upon the other; the doing of the one is not the Reward for the doing of the other; but they are distinct Acts, and each Party to do his Part; there was also a Day appointed. And this is not a hard Case, for they are mutual Acts not depending the one on the other. But in our Case, the Money was to be paid for the Release; and a vast Difference. And the 7 *l.* being not to be paid in Consideration of making the Release, the Words *in Consideration* make a Condition precedent, which till performed does not intitle the Plaintiff to Action. Then the 7 *l.* were not demandable here, and consequently not dischargeable by the general Release of all Demands.

Another Objection was, that the Plaintiff had not averr'd a Release given, or tender'd by him, as he ought to have done. But here sufficient appears that it was done; for he avers Performance of all that was to be done on his Side; and that general Averment, tho' informal, and besides wants Time and Place, for which it had been bad on Demurrer, is help'd by the Defendant's passing it over and pleading a Release, whereby he admits the Plaintiff had a Cause

1 Inst. 147.

1 Vent. 147.

of Action. And there are stronger Cases than this in the Books, where Pleading over has help'd an insufficient Declaration. 3 H. 6. 8. Debt upon Indentures, in which there was a Penalty, in which the Defendant did bind himself, if he did not perform all the Covenants in the said Indentures; and regularly in such Cases the Way is, for the Plaintiff to set forth the Indentures, and to assign Breach of one of the Covenants in certain; and in Debt for the Penalty he said generally, that the Defendant had broke all the Covenants in that Indenture, without shewing any one in certain; the Defendant pleaded a collateral Matter in Bar; and adjudged the Declaration had been bad on Demurrer, but that the Plea over cured it, tho' the Breach was double and uncertain. 9 H. 6. 16, 19. And it was so adjudged in this Court, 1 Vent. 214. Pasch. 23 Car. 2. *Bernard v. Michel*, 1 Vent. 114. But a full Authority is that of *Vivian v. Shipping*, 1 Cr. 384, 385. tho' they agreed the Money awarded was to be paid before the other was to enter into the Obligation to the Plaintiff; yet the Plaintiff did not expressly aver Payment, but generally, as here, that he had performed all on his Side; and that was adjudged good after Plea pleaded. So we all agree the Judgment ought to be affirmed; for there was no Money due to the Plaintiff till Release of the Equity of Redemption, and therefore none demandable till then, and consequently a Release of all Demands could not bar it. Vide Yelv. 50.

Note; In this Case *Cowper* offer'd this Diversity in Relation to mutual Promises, that where the Promise is of a valuable Thing to the Defendant, there such Promise, without any Performance, may be a good Consideration; but where the Promise is not of a Thing valuable, but may be a Consideration, because a Trouble to the Party promising; there such Promise, without a Performance, cannot be a Consideration, because such Promise cannot be a Trouble. But *per Holt*, No Diversity at all; but the Cases are the same upon the Learning laid down above.

Parker versus Kett.

Salk. 95.
Deputy may
appoint a Per-
son to do a
particular Act,
but cannot
make a De-
puty.

IN Ejectment of Lands in the County of *Norfolk*, upon the Demise of the Defendant *Kett*; and Not guilty pleaded, a Case was made by Consent, and it was this: The Lands in Question were formerly the Copyhold Inheritance of *C. Kett*, who by his Will devised the same to

Eliz.

Elizabeth his Wife for Life, and after her Decease to *C. Kett* his Son, and to the Heirs of his Body; and if he died under Age without Issue, the Remainder to his own right Heirs. *A.* by Writing under the Hand and Seal of the Lord of the Manor, whereof the Premises were Parcel, was constituted Steward of the said Manor, to exercise the said Office of Steward by himself, or sufficient Deputy. *A.* made one *O. C.* Deputy-Steward; who, by Writing under his Hand made two other Persons Deputies to him, to the Intent to receive a Surrender from *C. K.* the Father, to the Use of the said Will, with Power to them two, or either of them, to receive the said Surrender; one of whom came to the said *C. K.* then sick in his Bed, and received his Surrender. *C. K.* dies; at the next Court of the Manor this Surrender was presented by the Homage, and received. *Elizabeth* the Wife is admitted Copyhold Tenant, according to the Will. And the Question was, whether this Surrender, received by one under Authority of *O. C.* the Deputy Steward, be a good Surrender.

This had been argued several Times at the Bar; and this Term, *per totam Curiam*, that, as this Case stands, the Surrender was a good Surrender, was unanimously resolved. And two Questions were made; 1st, Whether the said Persons appointed by *O. C.* the Deputy Steward, had a good and sufficient Authority to receive the Surrender? 2^{dly}, In case the Authority were defective, whether that Defect be not by Intent and Construction of Law, or other subsequent Act of the Defendant, cured and helped? And as to that Matter, *Holt*, C. J. who delivered the Opinion of the Court, argued thus: I am of Opinion, the said Persons, deriving an Authority by Writing under the Hand of the Deputy Steward, were sufficiently impowered to receive this Surrender. And I go upon this Ground, that *O. C.* being Deputy of the Steward, is thereby invested with all the Power, and may do all such Acts as his Principal could do; for the Nature of Deputation is to convey all the Power of the Principal, without any Reservation or Restriction; for as he cannot enlarge his Deputy's Power, by giving him a greater one than he has himself; so he cannot abridge it by reserving Part to himself. And this is apparent by *Norton* and *Stire's* Case in *Hob.* 12. where the High-Sheriff constituted an Under-Sheriff, with a Proviso that he should not serve any Writ of Execution above the Value of twenty Pounds, without Leave of the High-Sheriff; and the Proviso is held void, and contrary to the Deputation itself, and therefore to be rejected. The

Deputy has all
the Power of
the Principal.

Proviso re-
straining
Power of De-
puty, is void.

Case

Cafe goes further, and says, 'That if the Under-Sheriff had covenanted or given a Bond, &c. to the High-Sheriff, not to execute such a Writ without acquainting him therewith, such Covenant, Bond, &c. were void. This being so, the Question will be, whether the High-Steward could empower one to receive a Surrender out of Court? and it was never doubted but he might: And it is the constant Practice of the whole Kingdom; for he that is so empowered acts indeed under the High-Steward, but not as his Deputy, but only to do one single Act. And a Deputy, as hath been said, having equal Power with his Principal, the High-Steward here, by making a Deputy, has given him all his Power; and by Consequence a Power to appoint one for a special Purpose to take a Surrender out of Court. And this is seen every Day, for the High-Sheriff, who need not make an Under-Sheriff if he will, may make his Bailiffs and Precepts to them: Yet if he make an Under-Sheriff, of necessary Consequence he gives him Power to make Bailiffs and Precepts, without acquainting him therewith. And this he can do only by Virtue of his Deputation; and why shall not an Under-Steward, or Deputy-Steward have the like Power?

But a considerable Objection is made; for in the Cafe of Under-Sheriff, he acts all in the Name of his Principal; and the Deputy-Steward here took no Notice of his Principal.

Deputy-Sheriff must act in the Name of his Principal.

Answe. It is true the Deputy-Sheriff must act in the Name of his Principal, because the Writ is directed to the High-Sheriff, and the Under-Sheriff acts under the Authority and Command of the Writ, and therefore must act in the Name of him to whom the Writ is directed. But here the Under-Steward acts under his Principal's Authority at large. *Vide Comb's Cafe, 9 Co.* by which it appears, that he that acts under another ought to act in his Name, and that is good Law without Dispute; and I agree that here *O. C.* might make Use of his Principal's Name, and it had been well; but the Question is, whether it be not well in his own Name; and sure it is, upon the Reason of that very Cafe. It was a Letter of Attorney to make a Surrender in the Name of a Copyholder; and the Attornies might, in that Cafe, draw a Surrender in the Copyholder's Name; but they do not do that, but recite their Authority, and say that they by Virtue thereof make a Surrender. And tho' it was they surrendered, yet it was not their Surrender, but they did it by his Authority; and it was substantial tho' not formal; for the Entry in such Cafe is, that *A.* by *B.* his Attorney, came into Court and surrendered, &c. yet being made

If Deputy-Steward acts in his own Name, it is good.

made as above, it is well enough, tho' generally and legally the Act of an Attorney is the Act of his Principal, and so is the Act of a Deputy. And therefore, here on Record it is not said *A.* an Attorney, in the Name of *B.* his Principal, did so and so; but that the Principal by *A.* his Attorney, &c. and so should the Surrender in *Comb's* Case have been; but being by Virtue of an Authority from the Principal, it was held well. But in *Comb's* Case the Authority is recited, but that is not done in our Case: If it had been said here, *By Virtue of an Authority which I have from A. the High-Steward, I do appoint such and such to receive the Surrender,* it had been well, according to *Comb's* Case; but instead of that he takes upon himself, as Principal, to give Power to accept a Surrender, and yet I hold it well enough.

For when one has an Authority, and does an Act which can be good no other Way but by Virtue and in Pursuance of that Authority, it shall rather be understood to have been by Force of his Authority than void; tho' in doing the Act he takes no Notice of his Authority: But where one has an Interest and an Authority together, and he does an Act generally, it shall be construed in Relation to his Interest, and not to his Authority: And this is the very Point of *Cler's* Case, 6 Co. he was seised in Fee of three Acres of Land *in capite*, of equal Value; and made a Feoffment in Fee of two of them to the Use of his Wife for Life, for her Jointure; and of the third Acre to the Use of such Person and Persons, and of such Estate and Estates, as he should devise by his last Will; and after by his Will devises the said third Acre, without any Notice taken of his Power reserved upon the Feoffment: Now, if they had been three Acres of Land in Socage, and he had made such a Feoffment, and after devised the third Acre, without Reference to his Power, it had past by the Will, because then it might either pass by Virtue of his Interest, by the Will, or his Authority by the Feoffment; but being *Capite* Lands, which could not pass but by the Authority, because he had pass'd two Parts by Act executed; this Devise was construed to be an Execution of his Authority, because otherwise the Devise had been to no Purpose. So in the Principal Case, the Deputation, or rather Authority given by the Deputy, shall be intended to be by Virtue of his Authority; for otherwise it would be utterly void: And that tho' the Deputy took no Notice of his Principal in his giving that Power, and there is no Diversity between those two Cases. And a Deputy-Steward

Where one has Authority, and does an act which can not be good but under the Authority, it shall be taken to be under it.

may hold a Court without taking Notice of his Principal's Name, and it will be good either Way; and if he can hold a Court in his own Name, as Deputy-Steward, why cannot he appoint another in his own Name to act for him to a particular Purpose, without taking Notice of his Principal; and therefore this seems a good Execution of his Authority as Deputy, if there be no more in the Case.

But it is objected, 'That the Person, to whom the Surrender is made, is by the Writing named a Deputy; and a Deputy cannot make a Deputy, nor can the Power of Deputy be more or less confin'd than that of his Principal. And I agree there cannot be a Deputy of a Deputy, nor the Power of a Deputy abridg'd. But the Word Deputy in the Instrument must be only construed to shew the Deputy's Intent to empower him only for this particular Purpose; and besides there are general Words in the Instrument, sufficient to give Authority to accept a Surrender. 3 Cro. 533. seems to me in Point, tho' upon a Penal Law, inflicting a Forfeiture of Goods upon any that shall land them, without agreeing with the Collector, his Deputy or Comptroller; and the Collector made a Deputy, who made another, with whom an Agreement was made, which was after adjudg'd good, not as made with a Deputy, but with a Deputy's Servant; *similiter hic*.

Acts of Steward
de facto
good.
2 Lev. 184.

And suppose there were a Defect in this Power, and it were not good to all Purposes; yet, as this Case stands, is not this Person a good Steward *de facto*, (as they call it) as to this particular Purpose, and this Act as good as any Act by a Steward *de facto*. And I am of Opinion it would be good so too; for it is agreed a Steward *de facto* may take a Surrender, and a Steward *de facto* is in Truth no Steward at all, for he only acts as such, and so did this Person; and he is in Fact and Law no Steward, yet his Act shall be judged sufficient in Case of a Formality, as here, only to receive a Surrender, or be an Instrument to pass the Estate.

Besides, there is Colour of a legal Authority; O. C. is agreed to be a good Deputy, and takes upon himself to appoint a Deputy; suppose it is so, which he cannot do, no more than an Under-Sheriff can make an Under-Sheriff, or a Bailiff make a Bailiff; but still it gives a Colour, and here is the Appearance and Form of a legal Proceeding, and he is reputed to have an Authority; and in such Case, if Surrender be taken and duly presented, it will be well, beyond Dispute. *Moor* 108, 110. goes very far in this Case. Two

Joint-Stewards of a Manor to execute the Office jointly, but not severally; and one of them held a Court, at which a Copyholder was admitted; and it was adjudged well by the whole Court of Exchequer, and after that Judgment affirmed in the Exchequer Chamber, as to this Point, but reversed upon another Point. And one alone had no more Power in that Case to act, without his Companion, than if he had not been named at all; yet because there was a Colour and Shew of a legal Court, and a Surrender made and presented, it was held good. And the Words of that Book are very strong; for *Mamwood*, who delivered the Opinion of the Court, that the Surrender was good, took two Diversities. 1st, Between Surrenders and Admittances or Grants. If Lord Disseisor receives Surrender, and makes Admittance thereupon, it shall bind the Parties and the Disseisee; but if he make a voluntary Admittance or Grant, the Disseisee shall avoid it.

Where there is a Colour and Shew of a legal Court, the Acts are good.

To a voluntary Grant of Copyhold, must be Title to make it good.

Another Diversity taken, is between one that has Colour of Right, and yet has no Right; and one that has neither Colour nor Right. If one who has only such Colour holds a Court, and another surrenders to him, it is good; or if the Suitors make their Suit to him, they shall be discharged of that Service. And he goes further, and shews what shall be sufficient to make a colourable Steward; as where one holds his Court without Contradiction of the Lord; or Under-Steward holds a Court after the Death of the High-Steward; or if the Lord's Clerk holds the Court; all these are colourable Stewards; and I think this Person here had as much Authority to do what he did, as a Deputy to hold Court after the Death of his Principal, &c.

And the Reason of the Law in other Cases agrees with this; as an Executor *de son tort*, who is but an Executor *de facto*, if he does lawful Acts with the Goods, as paying of Debts in their Degrees, it shall alter the Property against the lawful Executor; as if he pay just and honest Debts, the rightful Executor shall not avoid that Payment; and yet it is an Act done by one that has no Right: It is true he is not quit against the rightful Executor, but he shall maintain Trover against him; but what shall he recover in Damage? only for so much as he has misapplied, and all that he has well applied shall be abated in Damages. And what is the Reason of this? Why, because the Medling with the Goods is that which gives the Creditor Notice who is Executor, and bound to pay the Debts; and the Creditor is not bound to enquire into the Executor's Title; if there be a

Payment of Debts by *tort* Executor are good. Ante p. 441.

3 Cro. 565.

Colour

Colour and Appearance of it, it suffices. If Executor *de son tort* gets 300 *l.* of the Testator's Goods, and pays it duly to a just Creditor, there the lawful Executor, in my Opinion, shall not even maintain Trover against the wrongful Executor, because it is a good Payment, and no Prejudice to the Executor. So here, there is no Prejudice to any, and it is only an Act of Formality. 2 *Cro.* 552. 1 *Ro.* 101, 130. *Pal.* 20. the Bishop of *Ossory's* Case; there was a void Sentence of Deprivation against him, and the See full of another who acted *de facto*; and there cannot be two Bishops of a Diocese, and the Sentence of Deprivation was set aside as void; yet it was resolved that all Institutions and Inductions, &c. by the colourable Bishop were good, as if done by a rightful one; and shall not the same Reason hold here?

Acts done by a Bishop *de facto*, as Institutions, Inductions, are good.

1 *Leo.* 288.

Another Case, stronger rather than this, is that of 1 *Leon.* 288. cited at the Bar; my Lord *Darcy's* Case, who being Lord of a Manor, made a Steward, with Power to make a Deputy; and the Steward, instead of making a Deputy, sends his Servant to hold the Court, and in that Court a Surrender was made; and tho' it was said there, that a subsequent Act of the Lord's amounted to a Confirmation, it could not avail as such, if there were no Copyhold Tenant before, and in by Surrender and Admittance. *Vide* 4 *Co.* 25. And if it works by Way of Confirmation, it must have wrought upon the Estate granted by the Surrender to the Servant; and yet that Surrender was not at any real Court, nor could the Lord's subsequent Agreement amount to a Grant, and he is Copyhold Tenant no otherwise than by the Surrender to the Servant; and sure if Servant may hold a Court to take a Surrender, he may take one out of Court, and the Lord's Consent after could only make it undefeasible, but not give a Being to his Estate.

Lane versus Sir Robert Cotton.

Salk. 17.
5 *Mod.* 455.
Carth. 487.
Case against
Post-Master
for the Loss
of a Bill de-
livered at the
Post-Office,
and lost in the
Office.

IN Case the Plaintiff declared, reciting the Statute of 12 *Car.* 2. c. 35. by which one General Post-Office, and one General Post-Master are erected, for the sending of Letters all over the three Kingdoms, &c. and also the Statute of *Jac.* 2. c. — And that Sir *R. C.* was made Post-Master by Letters Patent of the fifth of *May, tertio W. & M.* pursuant to the said Act of 12 *Ca.* 2. by which the said Master has Power to make Deputy and Deputies, and other Officers and Servants under them, as they shall think fit; that the

said

faid Master by these Patents is to obey such Rules and Orders, as shall be given him by the King under the Sign Manual; and as to the Revenues of the Office; the Master is to observe the Order and Direction of the Lords of the Treasury; and in the said Letters Patent the King covenants; that he shall be only answerable for such Miscarriage and Neglect as shall be his own, and not for that of any other Body; and for the executing this Office an Annuity of 1500*l.* a Year is granted him out of the Profits of the Office: That the Plaintiff being possessed of eight Exchequer-Bills in *London* did inclose them in a Letter, directed to one *Jones* a Goldsmith in *Worcester*, and delivered the said Letter, with the Bills so inclosed, to one *B.* then an Officer under the Defendant, duly elected to take in, and deliver out, Letters at the Office in *London*, to be sent according to the Direction; that this *B.* received his Salary by the Hands of the Receiver General; and that the said Letter, being so delivered to him, was taken out of the Office at *London* by an unknown Hand, and lost; and whether an Action lay against the Post-Master, or not, was the Question.

And it was argued for the Plaintiff, The Office of Post-Master was an antient Common Law Office, but exerciseable by any, and as many as would take it upon themselves; against whom any Person had his Remedy for any Damage that happened through their Default; this was the Law before the said Statute, whereby one General Post-Master is appointed but not by Way of creating a new Office, but making one Publick Office of all the prior private ones. And the End proposed by the Parliament in so doing, as the Act tells us, was a more speedy and safe Conveyance of Letters. So that this being an antient Common Law Office, ought to be governed by the same Law with other Common Law Offices; and therefore the Posts, whether private or publick, are to be considered as common Carriers of small Packets; and consequently liable to make Satisfaction for Miscarriages, as other common Carriers. And that the Statute meant to make them liable appears by its saying the Office is made publick for greater *Safety*: And since before, the Party that sent Letters by a private Post had the Security of an Action against him, if he miscarried, of Necessity that Remedy still continues in like Manner against the Post-Master General, or else the Preamble of the Statute were false.

By the 2. §. of the Statute it is ordained, there should be one Master, or general Officer, who from Time to Time should have the Sending of all Letters and Packets, &c. to
6 E their

their several Addressee; from whence I infer, *1st*, That (*all*) Letters are to be sent by him. *2^{dly}*, That he is an Officer.

By the 8. §. None but the Master General, or *his* Deputy, is to receive or carry Letters by the Sea or Land, or hire Horses or Boats for that Purpose; the Act does not say that none shall carry Letters but the Master, or other Officer put under him by the King; but, by *him* authorised. *Vide* §. 2. and 10.

By the 15. §. he is bound to find Post-Horses, under Pain of 5 *l.* for every Failer; which shews that he is to answer for his Under-Officers; and in the Letters Patent, whereby the Defendant is nominated, there is a Covenant from the King, that Defendant shall not answer for the Default of any but his own; which shews, he apprehended himself liable for those of his Officers, and therefore provided against it by the Covenant. And it is no Reason to say, that the Under-Officers are the King's Servants, and not his, because the King, and not he, pays them; for that is not so by the Act of Parliament, but only by a private Agreement between the King and him; and such Agreement cannot deprive the Subject of a Benefit which the Law gives him.

The Sheriff, who by Law is obliged to take upon him his Office, is answerable for the Miscarriages of his Under-Officers; *a fortiori* in this Case, where one is not compellable to take the Office upon him; and it is for this Reason that a Grant of the Office of a County Clerk by the King is void. 4 *Co.* 32.

Then there is a manifest Neglect in the Defendant; for by the Statute, the Master and his Servants are to send Letters and Packets to their Directions; and it is Part of the Case, that the Letter in Question was delivered to the Person appointed to receive Letters in the Office, which is the same Thing as if it were delivered to the Defendant himself; and his Duty was to send it, wherein he fail'd; for it is agreed it was taken by a Stranger out of the Office. Besides, the Letter was given to be sent, and he received it so; and his receiving to send, was to send safely, according to *Southcoat's Case*, 4 *Co.*

And it is upon this Reason, that all Tradesmen are obliged to do Things carefully and skilfully; and if they fail therein, Case will lie against them; for the very taking upon them to do it is a Taking to do it carefully and well: And if it be so in every private Person's Case, *a fortiori* it will be so in the Case of a Publick Officer, whom one is compellable to use. And upon this Reason also it is, that

Case lies against a Sheriff for the Escape suffered by his Bailiff; much a harder Case than the present. By the same Reason the Defendant, having taken upon himself this Office, has also taken upon himself to do it carefully; but instead of that, the Letter is taken away in the very Office, where none could come without his Leave. And if this be through the Neglect of him, or his Servants, he ought to answer for it; like the Case of an Inn-keeper, who shall answer for his Servant's Neglect.

It is objected the King has all the Revenue of the Office, and the Master but a Salary insufficient to answer Casualties of this Kind. *Ans.* It was his Folly to take the Office upon those Terms. And this is a stronger Case against them than that of *Ray*. 202. for here it does not appear that any Trick was used to get the Letter from them, or that they used convenient Care.

If the Master be not liable to our Action, we have an Injury done us, and no Remedy for it: We have it not against the King, for he is only to nominate this Officer; and the Under-Officers are only Servants, and accountable to their Master only. And then the Consequence would be very dangerous both to the King and Subject; for by the Act none can send Letters by any private Post; and if one cannot send his Letters but by one Hand, and that he may with Impunity imbezil all Letters, farewell to all Trade and Commerce, one of whose chief Support is Correspondence by Letters; and what can be more fatal to the Revenue than a Decay of Trade.

Contra it was argued, 1st, That Exchequer-Bills were not such Things as the Post-Master was, by the Duty of his Office, obliged to take in. 2^{dly}, That by the Act he is not bound to make Satisfaction for every particular Man's Loss in the Things within the Extent of his Office. 3^{dly}, That in this Case he is not answerable.

1st, The first depends on the Construction of the Statute, what it intends to be sent by Post; and the Statute intended a Maintaining of Correspondence at home and abroad; and that by carrying of Letters, not Goods or Money, for that is not necessary for mutual Correspondence. Indeed, whatever Thing, by the Intent of the Statute, is within the Office of the Post-Master, is not to be done by any other; but without Doubt any other may carry Money or Goods, without Offence against the Statute; *ergo* such Things are not within the Extent of the Post-Master's Office; and a Carrier may carry a Letter along with Goods. Now Exchequer-Bills

Bills are of the same Nature with Money, and current as such; and by Consequence may be sent with a Letter by a Carrier: *Ergo* not within the Duty or Extent of the Post-Master's Office; and one may as well say the Post-Master is bound to send Jewels. And it would be a hard Construction that the Master should carry Exchequer-Bills, for these Reasons. 1st, He must send his Packets by Day and Night, for the Speed required by the Statute. 2^{dly}, He must trust Boys and indigent People, whose Poverty will make them obnoxious to Temptations; for none of Substance or Ability to give Security will undergo such Slavery. 3^{dly}, It is impossible for him to send sufficient Guard, from the Smallness of the *Premium*, the Dispatch they must go with, and Incertainty of Wind and Weather; therefore, from the Nature of the Thing, the Parliament intended the Office for such Things as in their Nature might be sent with Speed and Safety, which Exchequer-Bills, being current as Money, are not.

There is a Clause in the Statute which shews it intended not that Things of Value should be sent by the Posts; for it says such Things might be sent by Messengers; and Bills of Exchange are the only Things which may seem of Value that it mentions might be sent by it: But the Reason of that is, because, 1st, it was very convenient for Trade. 2^{dly}, There was no Danger in it; for when this Statute was made, Bills of Exchange were payable to a third Person, or Order, and if they were foreign Bills, there were Letters of Advice; so there was no Temptation of Stealing them, and by Consequence no Danger.

2^{dly}, If we consider the Smallness of the *Premium*, we find it bears no Proportion with the Risque he would run, if he were liable for Miscarriages; which is a Demonstration the Parliament did not intend he should; for they do not proportion the *Premium* according to the Value of the Thing sent, but according to the Weight and Distance of Place. And there is a Clause, that the Price should not be enhanced upon Account of Bills of Exchange; which plainly shews they did not intend he should answer for a Miscarriage of them.

The Statute impowers him to appoint Agents and Deputies all over the World; and the Argument used would make him liable for the Miscarriages of them. And such Construction would destroy the Office it self.

There is no Comparison between the Office of Carrier and this; a Carrier is not bound to travel but by Day, and if he be robbed he has his Remedy over: He himself may travel

with his Waggon in Person. If a Thing of Value be sent, he may make his own Price, according to the Risque he runs; whereas the Post must travel by Night, trust Deputies, has no Remedy over, if he be robbed by Night, and cannot insist upon a Price, but what is cut out by the Statute.

This is not like the Case of a Master of a Ship, who is answerable to the Owners for Damage done by the Seamen to their Goods; because 1st, he is there in Person, to see and correct what is amiss. 2^{dly}, That is upon a particular Contract between him and the Owner, according to the Maritime Law; and he may choose whether he will go or not, if he does not like his Reward; but in our Case, one may send 1000*l.* worth of Exchequer-Bills and the Master know nothing of it.

Nor is it like the Case of a Sheriff, who tho' liable to serve against his Will, yet must answer for Escapes of his Officer. For, 1st, he is answerable only for the Affairs of one County. 2^{dly}, He may raise the *Posse Com'* to secure his Prisoners.

3^{dly}, This Letter was taken out by an unknown Person, and that must be understood to have been forcibly, and against our Will; and if so, we would not be answerable, no more than a Factor would be to his Principal for what he is robbed of.

And *Turton*, *Powis* and *Gould* were of Opinion the Action did not lie against the Master; because this was not like Common Law Offices, in which the Superior answers for the Inferiors as his Servants; but this was an Office newly created by Act of Parliament; and, as *Gould* called it, founded in Government, that is, in which each had a distinct Branch to exercise; yet with Subordination and Dependancy on the Chief Master, but not as Servants, but by the very Constitution and Erection of the Office; and this by Act of Parliament, to which every one is consenting; and he said, every one of these, in his own peculiar Station, was as much an Officer *pro tempore* as the Master; and compared it to a Corporation, in which the Head is over the rest, yet not answerable for the Miscarriage of an Inferior Member. 1 *Ed. 5. 5.* And *Turton* and he agreed, that Exchequer-Bills were not Things proper to be sent by Post; and they also all agreed the Reasons before offered for the Defendant. But *Powis* held, there were sufficient Words in the Act to comprehend Exchequer-Bills.

Holt C. J. cont. and argued thus: Notwithstanding what has been said at the Bar by Mr. Attorney, (since C. J. of

C. B.) my Brother *Wright*, (since Lord Keeper,) and *Cowper* King's Counsel, and by my three Brothers on the Bench, I am of Opinion the Plaintiff ought to have Judgment.

This Case is comprehended in a narrow Compass. And before I give my Reasons, it will be proper to observe upon what Points I go, and insist on; and for that it is to be considered, that it is no Part of the Question here, whether if a Letter be put in the Post, and sent safely out, and the Male on the Road is robbed, or some other Mischance happen, whereby the Letter is lost, whether, I say, the Post-Master be liable in that Case is not the Question now, for that is meerly foreign, and deserves a separate Consideration. But as this Case stands now before us, where a Letter is delivered to the proper Officer, in his Office in *London*, and there lost in the very Office, tho' no Diversity has been taken between these two Cases, either at Bar or Bench, yet I think them different.

And there is Reason the Master should answer for the Miscarriage of any Letter or Packet that is lost in the Office, tho' not actually delivered to him, but to his Servant; because that by the Constitution of the Office he is intrusted with the Profit and Interest of the Subject; and a Trust is reposed in him, for the Discharge of which he has a certain Duty or Salary. And he is made a Publick Officer by Act of Parliament; *That there shall be one General Post-Master*. And it is plain the Statute designed this for the Benefit of the Subject, as appears by the Preamble thereof; *quod vide*. And this was a Matter of general Concern, for Trade and Commerce; and to the End that Speed and safe Dispatch should be had of Letters and Packets, which in the Judgment of the Parliament was more likely to be had, by making one general Office and Officer; so it appears to have been done for the more Benefit and Safety of the Subject.

2dly, This Office is fixed at *London*, which is the Center of Business, from which all Letters are sent, and all Letters are to come; so there is a certain Place settled where this Office is to be.

3dly, It is an Office of Care, and that Care is committed to the Post-Master, that none but he, his Deputy or Servant, &c. is to take, receive or send any Letter, except such as may be sent by the Carrier, Coach, &c. as the Act directs.

So there is one Man set up, and all the rest to be his Deputies or Servants; so that from the Nature of the Trust, he is bound to keep safely in his Office all Letters and Packets delivered in there, at his Peril; because it is a

Trust reposed in him by Act of Parliament, that is by Law; and this Office is not at all distinguishable from that of Marshal of this Court, or of Warden of the *Fleet*, who are intrusted with such Offices by Common Law; and it is no Excuse for them to say that their Prisons were open'd by unknown Persons; tho' it be by People in open Rebellion, as in the Case of 23 H. 6. 1. the Case of the Duke of Norfolk. And the Reason is, because it is a Trust by Law in a Publick Officer; and it being done under a Government in which it is supposed he may have a Remedy over, at least such Remedy as the Law allows, tho' the Wrong was by Persons in open Rebellion; and there it was held, that Debt lay against the Gaoler for such an Escape upon the Statute of 2 R. 2. This was the Case at Common Law, where a *Capias* only lay for Damages in Trespas, but not for any Action of Debt, till 25 Ed. 3. c. 17. 3 Co. 12. And upon this subsequent Act, which gives *Capias* in Debt upon a Judgment in it, if the Sheriff suffer one in Execution, on such *Capias*, to escape, Debt will lie against him for it; tho' at Common Law, which made Sheriff liable for Escape, where *Capias* then lay, no such Process, as a *Capias* on a Judgment in Debt, was known: And he is as much bound to keep those that are in for Debt since that Statute, as those who were in for Damages in Trespas before; and so is the Law upon a *Levari facias*. By the Statute of W. 2. c. 18. an *Elegit* is given; and if Sheriff take Goods upon an *Elegit*, he shall be liable to answer for them, if they are rescued, as if they had been taken upon the Common Law Process of *Levari facias*. Upon the Statute of 13 Ed. 3. *de Mercatoribus*, the Sheriff is liable for Goods which he takes in Execution by *extendi facias*, by Consequence of Law meerly, for such a Thing was not before that Statute. Then what Difference can be made between the Marshal of this Court, and Warden of the *Fleet*, and this Officer? for the Master is to keep the Letters safe till he sends them out; as the Gaoler is to keep his Prisoners till they are legally discharged out of his Custody.

Another Reason why the Master should be liable here is, because the Subjects pay a Reward for keeping and sending away their Letters, and this Reward is paid to one who makes it his Business and Employment to take and send Letters and Packets deliver'd to him; and wherever a Man takes upon himself the Exercise of an Office, the Exercise whereof is for the Benefit and Advantage of the Publick, and takes a Reward for the same, he shall be answerable at Law for

Where a Man takes upon himself an Office for the Benefit of the Publick, he is liable for it.

Inn-keeper
liable for
Goods of a
Guest only.

any Harm the Subjects receive by his ill Administration of that Office or Employment, and for all Events and Chances, even from Thieves and like Malefactors. 2 Cro. 188. If Goods be left with an Inn-keeper by one that is no Guest or Traveller, and they are lost, he shall not answer for them, because he has no Benefit for the Keeping, and it is not his Employment to keep such; but if a Horse be left in his Stable, and he is lost, he shall answer for it, because he receives Profit thereby, arising from the Meat consumed by the Horse. And *Hob.* 80. in the Action against the Hoyman, which is the first of the Kind to be met with in Books, is upon that Reason, because he had a Hire for it.

My Brother *Gould* says, this is an Office founded in Government: If he means that it is an Office created and framed by Law, he ought to make a quite contrary Conclusion; for so is the Office of a Marshal, and yet he shall answer for Escapes: And should not it be so too in Case of an Officer created by Act of Parliament? for the one and the other are by Law, the one and the other for the Benefit of the Subject; in the one Case, the Prisoners to be kept for their Benefit to have their Debts paid; in the other, that their Letters be safely kept, and sent away with Speed; and why then should the Officer in one Case be answerable to the Subject for his Neglect or Default, and not in the other? And since then he is intrusted with this Office, for the Benefit and Advantage of the Subject, whatever consequential Damage befalls the Subject thro' his Neglect, he ought to answer for it.

Another Reason of Brother *Gould* against the Action was, That if it did lie, it must be upon a Contract express or implied. And truly I do not think that, but that he is chargeable by the Law and the Nature of his Office.

Another Objection was, That the Reward does not go to the Defendant. Whoever gives a Reward to have a Thing done for him, ought to have a Remedy, if the Thing be not done; and when a Reward is given to an Officer of Publick Trust, that intitles the Party to a Remedy if he be grieved through Neglect, or other Default of such Officer: And if he ought to have such Remedy, sure it must be against him who received his Reward. And is 1500*l.* a Year so small a *Premium* as not to incourage those that enjoy it to be more diligent in the Execution of their Office, so at least as to suffer no Neglect within the very Walls of the Office, as it was here. And tho' all the Salary or Revenue of the Office goes not to the Defendant, yet his Salary is to be paid out of the Revenue of the Office.

And there is no Diversity between this Case and the Case of *Mosse* and *Slew*, which was here, *Hill. 24 Ca. 2.* but entred *Mich. 23 Rot. 421.* which was thus: Goods to be transported to Foreign Parts were shipp'd in the River *Thames*; and there were a competent Number of Men on board for sailing the Ship, but they were in the River overpower'd and robb'd; and the Question was, whether an Action would lie against the Master of the Ship; and at a Trial at Bar the special Matter was found, and in Arrest of Judgment this very Exception was taken to excuse the Master, that he did not receive the Hire, but the Owners did, and the Master had only a Salary from them; but it was resolved against him. *1st*, Because he was a publick Officer. *2^{dly}*, Because his Salary was Part of the Hire, and did arise for the Care and Diligence that ought to be taken for the safe Custody of the Goods. And so here the Post-Master is a publick Officer, and he has a Salary from the Profits of the Office.

My Brothers have taken a Difference between the two Cases; for that in the Case of the Master of a Ship he might have taken Precaution, which Post-Master cannot use; but what Caution could there be used in one Case and not in the other? It is true it is said in that Case, that if the Owners of the Goods had brought them before such Time as was convenient before the Ship was ready to sail, he might refuse to receive them; and that may be: And it is so in Case of a Carrier; if Goods be brought to his Inn before the convenient Time for him to be gone, he may refuse to take them; but in both Cases, if one whom they intrust to receive Goods before such convenient Time receive Goods, and they be lost, the Carrier shall answer for them, and so shall the Master.

But no Man shall by Law justify to deny the Duty of his Office; for there is a perpetual Obligation upon them to keep the Things to them committed, till they have discharged their Trust; and when they have done, and no sooner, are they discharged.

This Case is within the same Reason of Justice and Equity of Law, upon which all Actions of this Nature are brought; and it has all the Ingredients whereby one is made responsible in like Cases for negligent keeping of Goods: For what is the Reason that a Carrier or Inn-keeper is bound to keep such Goods, as he receives, at his Peril? It is grounded upon great Equity and Justice; for if they were not chargeable for Loss of Goods, without assigning any particular

cular Default in them, they having such Opportunity, as they have by the 'Trust reposed in them, to cheat all People, they would be so apt to play the Rogue and cheat People, without almost a Possibility of Redress, by Reason of the Difficulty of proving a Default particularly in them, that the Inconveniency would be very great. And tho' one may think it a hard Case, that a poor Carrier who is robb'd on the Road, without any Manner of Default in him, should be answerable for all the Goods he takes; yet the Inconveniency would be far more intolerable, if it were not so; for it would be in his Power to combine with Robbers, or to pretend a Robbery or some other Accident, without a Possibility of Remedy to the Party; and the Law will not expose him to so great a Temptation, but he must be honest at his Peril. And this is the Reason of the Civil Law in this Case, which, tho' I am loth to quote, yet in as much as the Laws of all Nations are doubtless raised out of the Ruins of the Civil Law, as all Governments are sprung out of the Ruins of the *Roman Empire*, it must be own'd that the Principles of our Law are borrow'd from the Civil Law, and therefore grounded upon the same Reason in many Things. *Vide Just. Inst. lib. 4. tit. 5. de Lege.* And all this may be, tho' the Common Law be 'Time out of Mind.

And it is to be doubted that there was Intelligence given here, that there were Chequer-Bills in this Letter, otherwise it is improbable this Letter should be singled out from all the rest. I do not here arraign the Integrity of the Gentlemen that manage the Office, but we must here consider the whole Mass of Mankind; and tho' these are worthy Persons, yet bad may succeed them, who may search and open Men's Letters, and none be the wiser, or able to fix it upon them; being transacted in their own Office, and lying only in the Offender's Privity, who thus may with Impunity abuse the 'Trust reposed in him.

And a common Carrier, or Inn-keeper, or Master of a Ship must have answer'd. And in the Case of *Messe* and *Slew*, it appeared the Defendant was guilty of no particular Default, for a Power came upon him and robb'd him; but sure more Care might have been taken in this Case; for if *Breefe* had done his Duty the Bill could not have been taken out of the Letter in the Office.

Action lay against Carrier, before the Law gave him Remedy against the Hundred.

And the Diversity between the Case of a common Carrier and this, upon Account of the Carrier's having a Remedy against the Hundred if he be robb'd, it is none at all

in the Reason of the Thing; for before that Remedy was given, which was only by the Statute of *Winchester*, the Action did lie against him; and yet he had no Remedy but against the Robbers, if he could catch them; and the Master has the like Remedy here: And even now they are without Remedy in some Cases upon the Statute of Stannaries, other than against the Thief or Wrong-doer.

As to the Case of an Inn-keeper, this Diversity is offer'd between it and this, for that it is within his House, which is his Castle, and he may make his Servants watch all Night; but sure they do not consider that these Bills were lost within the Walls of the Office in *Lombard-Street*, which is likewise the Defendant's Castle, and that he may keep his Servants up all Night if he pleases: And the Care in keeping up his Servants to watch, if notwithstanding that a Misfortune should happen, ought rather to discharge than to charge him; and therefore no more Reason the one should be bound than the other. And the Case of the Inn-keeper is much a stronger Case, for he is bound to receive all manner of People into his House till it be full; but the Post-Master need let none into his Office but such as he pleases. As to the Case of Sir — *Herbert* and *Paget* in *Sid.* an Action brought against him for suffering a Rasure to be made in a Record in his Custody, and it was thought *prima facie* the Action lay; but on better Consideration, in as much as it appeared that he had not the sole Custody of them, but that Strangers of Right had Access to them without his Permission, the Plaintiff was barr'd: But here the Post-Master had the sole Custody, and no body had Liberty to come into the Office without his Leave.

I am apprehensive here some may think I would carry this Point farther than I have already declared, by comparing it to the Carrier's Case; and that by the same Reason an Action would lie if the Letter had been lost upon the Road. But I do not mean any such Thing, for I would not give any Opinion either the one Way nor the other in that Case; for it is a Thing that probably may come in Question hereafter: But let that be as it will, there is a Difference between that Case and the present; for the Carrier receives the Goods to carry safely, and the Post-Master the Letter to send safely, and those are the Words of the Act; and I wonder no Diversity has been taken between the Case of a Letter lost in the Office, and lost on the Road, being sent safe out of the Office; for there seems to be a great deal of Difference, and it may be a Question, upon the

Difference between Letter lost in the Post-Office and on the Road.
Words

Words of the Statute, whether when the Master sends the Letter safely away, he be not discharged.

Suppose then he was not chargeable in Case of a Robbery on the Road, it will not follow from thence that he is not bound to keep a Letter safe in the Office. And in the Case of *Mosse* and *Slew*, if the Ship had been robb'd at Sea the Master had not been answerable, yet he was chargeable at Land; so here, tho' he may not be chargeable for a Robbery on the Road, he may for a Loss in the Office. If a Man bring a Horse to an Inn, and desire the Master to put him into a Stable till it cools, and then send him to Grass; if the Horse be stole before he sends him to Grass, he shall answer for him; tho' if he had sent him to Grass pursuant to the Owner's Desire, he would not be answerable; and so he shall be chargeable till he has perform'd the Trust reposed in him, and as soon as he has performed it he shall be discharged. So here perhaps, if the Letter had been sent away safe out of the Office, he had perform'd his Trust, and had been discharged; yet it will lie as the Case is, where he has not performed his Trust by safely sending it out.

Then by the Duty of his Office he is to take Chequer-Bills, tho' this has been denied by Mr. Attorney and my two Brothers; but it is his Duty to receive them for these Reasons. 1st, By the Words of the Act he is to receive any Letter, Packet, or Thing proper to be sent by Post. 2^{dly}, This is a Thing proper to be sent by Post. As to the first, wherever any Subject takes upon himself a Publick Trust for the Benefit of the rest of his fellow Subjects, he is *eo ipso* bound to serve the Subject in all the Things that are within the Reach and Comprehension of such an Office, under Pain of an Action against him; and for that see *Kelway* 50. If on the Road a Shoe falls off my Horse, and I come to a Smith to have one put on, and the Smith refuse to do it, an Action will lie against him, because he has made Profession of a Trade which is for the Publick Good, and has thereby exposed and vested an Interest of himself in all the King's Subjects that will employ him in the Way of his Trade. If an Inn-keeper refuse to entertain a Guest, where his House is not full, an Action will lie against him; and so against a Carrier, if his Horses be not loaded, and he refuse to take a Packet proper to be sent by a Carrier; and I have known such Actions maintained, tho' the Cases are not reported. And why should not an Action lie against a Post-Master here, if he should refuse to take in a Letter, or

If Smith refuses to shoe a Horse, Action lies.

If Carrier refuses to take Goods, the Horses not being loaded, Action lies.

any other Thing proper to be sent by Post? and doubtless an Action would lie in that Case.

If the Inn be full, or the Carrier's Horses loaden, the Action would not lie for such Refusal; but one that has made Profession of a publick Employment, is bound to the utmost Extent of that Employment to serve the Publick. Sure then where it is a publick Employment created by Law, the Obligation is the greater; as if the Sheriff refuse a Writ, an Action will lie against him, because the Law charges him with an Employment for the Conveniency and Good of the Publick: So here the Law, *viz.* an Act of Parliament, charges the Post-Master with an Employment for the Good and Convenience of the Publick; therefore the Reason is the same. As to the second; These Chequer-Bills are proper to be sent by the Post, for the Act does not confine what Things are to be sent, but leaves it very general; it does not mention any Species, but any Letter or Packet whatsoever; then it is plain the Act meant other Things than Letters, or Packets of Letters should be sent, for the Prices are different, for there is so much a Sheet for Letters, and so much an Ounce for other Things, as Packets of Writs, Deeds, or other Things; which Words are as general as may be: So the Prices are varied from that for Letters, and any Thing whatsoever that may be sent by Post. And all Things, which by their Nature may be sent with Dispatch, and without Danger of hurting the Horses, are proper to be sent by Post, of what Nature soever they be; and nothing can be more portable than Chequer-Bills, for a small Packet of them may contain to the Value of 10,000 l.

If Sheriff refuses a Writ, Action lies.

Obj. They ought not to be sent by Post, because they are new Things, created long after the Act for erecting the Post-Office.

Ans. They are within the Reason of other Things, which were in *esse*, and within the Act when it was made. 4 Co. 4. a. b. No Agreement made before or after Marriage bar'd a Woman of her Dower, tho' she accepted what was agreed on after the Death of the Husband; but the Statute of 27 H. 8. c. 10. makes Estates for Life of the Wife, to take immediately after the Death of her Husband, to be a Bar of Dower, if it be made in Satisfaction of her Dower. And at the Time of making that Act, no Land of Freehold or Inheritance was devisable but by special Custom; and after by the Statute of 32 H. 8. they are made devisable. If such Husband, whose Wife is intitled to Dower, devise Land to her in Satisfaction of Dower, and she accept of it after his

6 H

Death,

Death, tho' it be a Thing not known or in *esse* at the Time of making the Statute of 27 H. 8. that makes a Jointure a Bar of Dower; yet being within the same Reason with other Jointures mentioned in that Statute, it is judged to be a Jointure within it. And by the same Reason, if Chequer-Bills be as proper to be sent by Post, as other Things that were in Being at the making of the Statute of 12 Car. 2. tho' Chequer-Bills were not then known, yet they shall be within the same Reason; and the Post as much bound to take and send them as any other Thing whatsoever. Another Instance of the like is in the same Case in 4 Co. by the Statute of Marl', made the 52 H. 3. A Man seised in Fee, incoffing his Son and Heir to defraud the Lord of his Wardship, the Feoffment is made void, as to the Lord. And by 1 R. 3. *Cestuy que Use* has Power to make a Feoffment of the Land out of which the Use arises; by 4 H. 4. the Heir of *Cestuy que Use* shall be in Ward. And if since that Statute, *Cestuy que Use* make a Feoffment by Virtue of 1 R. 3. to his Son and Heir, it shall be void by the Statute of Marl', made 200 Years before; and it will be as good an Argument to say, that if one come by the Chequer-Bill of another unlawfully, that Trover will not lie for it, for that they are new Things; as that they shall not be sent by Post, because they are new Things. But when an Act of Parliament creates a new Interest, it shall be governed by the same Law that like Interests have been governed before.

Where an Act
of Parliament
creates a new
Interest, it
shall be go-
verned by the

like Law such Interests were governed before.

It has been objected at the Bar, that the Post-Master is not bound to answer, 1st, for Bills of Exchange, payable to Bearer; because it was the Party's Folly to make them so payable. 2^{dly}, He is not liable for the Loss of them, tho' made payable the ordinary Way, *viz.* to such a Man or Order; because he is to have nothing for them as such, no Hire or Postage.

As to the first; A Bill of Exchange payable to Bearer is lawful; and it is Prudence in any Man, that has a Mind to negotiate a Bill of Exchange, to get it drawn in that Form, for then it needs no Indorsement, and by Consequence, if he does negotiate it, shall not be chargeable; whereas if it were made payable to one or Order, for every Negotiation there must be a new Indorsement, and every Indorser is become liable *in infinitum*. And all Bills without Exception are to be sent by Post; and this Sort of Bills being lawful may therefore be sent.

I

But

But they pay no Reward for sending or carrying them; therefore the Post-Master ought not to answer for a Miscarriage of them.

Answer. Whoever writes or sends a Letter with a Bill of Exchange in it, it shall be intended that the Letter was writ and sent for the Sake of the Bill, and therefore tho' the Post does not receive an immediate direct Reward for the Bill, yet it receives a mediate consequential one; as in the Case of an Inn-keeper, a Passenger pays nothing for the Keeping of his Goods in the Inn, but pays only for his Victuals and Lodgings, and the Reward which he pays for his Victuals and Lodgings intitles him to an Action for the Loss of his Goods. Besides Chequer-Bills are not exempt from paying; and without Doubt, if a Man sends a great Packet or Bundle of them, he is bound to pay according to the Bulk of his Packet. But suppose nothing were due for Chequer-Bills, no more than to a Sheriff for executing a Writ of Execution; yet if the Goods so taken in Execution be lost, he shall answer for them, he being a Publick Officer for that Purpose. And there never was an Instance, that an Officer intrusted by Law with the Goods of a Subject, but that, if he lose them, the Officer by Consequence of Law was liable for them. And *Southcot's Case* in 4 Co. is very strong, tho' by the By, that Case, as reported there, is not all Law; but where there is a special Undertaking to keep the Goods. For if there be but a general Bailment, and a general Acceptance, and so the Matter left to a Construction of Law thereupon, how the Goods shall be kept; the Law will make Construction, you should keep them as you do your own: But where there is a special Acceptance to keep them safely, there, at your Peril, you are bound by your special Acceptance to keep them safe, tho' you have no Reward, and that you are not compellable by Law to take them; which is stronger than our Case. And *Note*; this Case is better reported in 3 Cr. 816. But when Goods are given to an Officer of Law, surely there it must be intended that they are to be safely kept; and therefore he shall be charged. And I do not think there can be a Case put, where a publick Officer, or his Deputy, was ever discharged in Case against him for a Miscarriage in them for Goods, or other Things, lost through their Neglect.

Another Reason to charge the Defendant is, because before the Statute of 12 Car. 2. the Subject had Liberty to send his Packet by any other Post-Master he pleased, of which there were many in those Days; it being then law-
ful

ful for any Man to set up such an Office. And if such, as had set up such an Office then, had been robb'd, the Subject would have had his Action, and recover against them, as much as against a common Carrier; and this is admitted by the other Side. So it is very reasonable, that those that take it now should take it upon the same Terms it then stood; and the Office is not new, but only, that instead of being exercised by many before, it is now exercised only by one; and all Persons by this Act are forbid to use any other Post, or to send by any but by this one, that is to be by Letters Patent under the Great Seal. And the Post-Master was, as I said, chargeable at Common Law before, and the Employment is now the same that it was then, only that of being exercised by one Person; therefore every Thing, that was incident to it then, remains so still. And since the Subject is deprived of his Election of trusting whom he pleased with his Letter, surely to compel him to send by one against whom he should have no Remedy, would be the most unreasonable Thing in the World, and the most unjust Construction upon the Statute.

A Servant not chargeable for Neglect, only for Mifseafance.

It was objected at the Bar, that they have this Remedy against *Breefe*. I agree, if they could prove that he took out the Bills, they might sue him for it; so they might any Body else on whom they could fix that Fact; but for a Neglect in him they can have no Remedy against him; for they must consider him only as a Servant; and then his Neglect is only chargeable on his Master, or Principal; for a Servant or Deputy, *quatenus* such, cannot be charged for Neglect, but the Principal only shall be charged for it; but for a Mifseafance an Action will lie against a Servant or Deputy, but not *quatenus* a Deputy or Servant, but as a Wrong-Doer. As if a Bailiff, who has a Warrant from the Sheriff to execute a Writ, suffer his Prisoner by Neglect to escape, the Sheriff shall be charged for it, and not the Bailiff; but if the Bailiff turn the Prisoner loose, the Action may be brought against the Bailiff himself, for then he is a Kind of a Wrong-Doer, or Rescuer; and it will lie against any other that will rescue in like Manner; and for this Diversity *vide* 1 *Leon.* 146. 3 *Cr.* 175, 143. 41 *Ed.* 3. 12. 1 *Ro.* 78. which is not well reported, but the Inference may be well made from it.

And here the Defendant hath the Power in him to manage the Office by himself, his Deputy or Servant; and every Deputy or Servant is by him that puts him in, and therefore he ought to answer for him; and the Reason why a

Principal

Principal shall answer for his Deputy is, because as he, as Principal, has Power to put him in, so he has Power to put him out, without shewing any Cause; and that, tho' he had expressly given him an Estate for Life in the Deputation. *Vide Hob. 13. Mo. 856. 39 H. 6. 34.* And a Deputy or Servant may bring a greater Mischief than this comes to upon his Principal; for if one has an Office of Inheritance, in its Nature forfeitable for such and such Offences, or Misdemeanors, and he puts in a Deputy, who commits such Acts as would be a Forfeiture in the Principal, if he had done them, he shall forfeit the Office for his Principal. 39 H. 6. 34.

The Case in *Dy. 238.* to my great Wonder has been quoted by my Brother *Gould* as an Authority for him, for it is directly against him; by 3 H. 6. c. 3. any Customer that shall conceal any of the King's Customs due for Merchandize, shall forfeit treble the Value of the Merchandize; and by the Statute of 1 *El. c. 11.* The Customer of any Port may make a Deputy for the Customs of any Creek belonging to that Port, and a Deputy so appointed had conceal'd the Custom, and the Principal, ignorant of this Fraud, certifies his Account into the Exchequer, without taking Notice of this Fraud, or the Custom due for the Concealment; and an Action brought against the Principal, and adjudged it lay; and what is the Reason thereof, but because the Principal shall answer for his Deputy? And where it is said, that the Deputies of the Post-Master by the Act have Power to make Deputies, and they are to have Servants, who are to act under them, that makes no Matter, for the Principal shall answer for all the Neglects, not only of the Deputies he makes, but also of that Deputy's Deputy and Servants, and so down; for he shall be answerable for every Act of them, that shall tend to the Prejudice of another in their Deputation. But that is not this Case, for *Breefe* in this Case, through whose Neglect this Letter has been lost, was immediately put in by the Defendant himself; tho' if it were by his Deputy or Servant, it had been the same.

My Brother *Powis* says, they are all Fellow-Servants; that is, the Post-Master and Letter Carrier; because they all receive their Salaries from the King, tho' retained and put in by the Defendant; and compares them to a Steward and Servants of a Nobleman's House. But I answer, that they are paid by the King as Deputies and Servants of the Defendant; and there is no Diversity but in the Manner of pay-

ing them, for they are under the Command of Defendant, and to act according as he directs; and it was intended by the Act, that he should pay all his Servants out of his Salary; and if he agrees with the King to have so much clear for himself, and that the King shall pay his Servants, they are no less his Servants because the King pays them; and if they be not his Servants, what becomes of the Defendant, who is by the Act to manage the Office by him and his Deputy, and Servants; and if he let People manage it, who are not his Servants, and over whom he has no Power, and they imbezil Goods or other Things, sure the Defendant shall answer for it, for he does not manage the Office as the Statute directs; and his letting People in that are meer Strangers, that ought not to be there at all, shall not excuse him from Neglect or other Mischance.

But now my Brother has found out a better Employment for him, and compares him to a Captain, and his Deputies and Servants to the Soldiers of a Company, and as the Captain shall not answer for the Valour and Courage of his Soldiers, so neither shall he for the Care and Diligence of his Servants. I am of Opinion, that if any particular Person suffer a particular Prejudice by the Want of Courage of a Soldier, whom the Captain takes in by his own Election, he shall have an Action against the Captain for it; but that is not the Case: For where a Trust is put in one Person, and another, whose Interest is intrusted to him, is damaged by the Neglect of such as that Person employs in the Discharge of that Trust, he shall answer for it to the Party damaged. And the Case of a Master of a Ship is much more like that of a Captain than the present; and yet he shall answer for the Neglect of his Seamen, and it is not his Captainship will save him; and he shall answer for a Robbery committed on him on Land, and for Neglect of his Men at Sea; tho' he shall not be answerable for a Robbery on the Sea.

And it seems plain to me the Act intended he should be answerable for all the Letters and Packets they should receive, and for the Default of their Servants. For first, it has given the whole Power and Government of the Office to the Master General; and as this Care is delivered to him, so no Body is to intermeddle but he, and such as he shall intrust; and if this Act were said to create this Office as a new Office, notwithstanding the Action would lie; for when an Act erects a new Office for the Benefit of the Subject, under the same Circumstances with other Offices, in which the

Subject has an Interest, in Respect whereof the Person exercising them would be liable to an Action for the Default of his Servant, it must be presumed the Act designed the new Officer should be liable; for why else should they make it so like in Reason? And in this Case he is intrusted with the Interest of the Subject as much as the Sheriff, or other Officer of Justice is; and the Act directs the Letters should be sent with safe Dispatch; and who is to do that but the Post-Master?

Further it appears, that it was the Design of the Statute, that he should be answerable for the Default of his Deputy; and for that consider these two Clauses. 1st, That the Post-Master and his Deputies, and no other, should find Horses; and if through Default of Post-Master, any Person shall fail of getting Horses, in all such Cases the Master shall forfeit 5 *l.* consider the Words, *and if thro' Default (of the Master), not (of his Deputy)*; which shews they intended, that if any Fault be, that it shall be reckon'd that of the Master. For if one that rides Post cannot be furnished with Horses, who shall forfeit the 5 *l.* for every Default? The Master, and not the Deputy; and then sure the Default of the Deputy is the Default of the Master; and this appears plainly by this Branch of the Act.

It is objected, this will ruin the Office. But I think the contrary; and that it will be the Means to have the Office well kept; and will make them more careful to do their Duty, and to discharge the Trust reposed in them. But it is objected, that one may choose whether he will send his Letter by Post or not, for he may send a Messenger of his own; and that is true; yet it is no Excuse for the Defendant; for if there be several Inns on the Road, and yet if I go into one when I might go into another, and am robbed, or otherwise lose my Goods there, the Election I had of using that, or any other Inn, shall not excuse the Inn-keeper. So here, the Plaintiff had Election to send by the Post or Messenger; and if he sends by Post, and that there is Default in him, he shall have his Action. And he cannot send by the Messenger with Speed, as by the Post; and Speed was one of the Benefits designed by the Statute to the Subject; and it took away the Advantage he had of sending by a speedy Messenger before, and so would put him in a worse Condition, which never was the Intent of the Act; and as to the Smallness of the *Premium*, there is nothing in that, for the Law thinks it a reasonable Reward; and if one does not like the Conditions of an Office he may let it alone.

Then

'Then as to the Clause in the Patent, that the Defendant should not be answerable for any Neglect, but his own immediate Neglect; it must be intended only in Relation to the Management of the Revenue, for which they are to account to the Lord Treasurer, or to be against Law; for it is not a Grant by Letters Patent, that shall deprive the Subject of the Benefit given by the Act; for the Post-Master is to act according to the Statute, and not according to the Letters Patent. And where it is said, that they shall from Time to Time observe such Directions as are sent to him under the Sign Manual; if any ill Consequence happen by such an Observation, they are not excused; I say then, that this Clause, that they shall not answer for Miscarriage of Servants, or any but their own, may have this Effect, to exempt them from any Mismanagement of the Revenue of the Office; because that being the King's, he may order that as he pleases. But that Clause in a Patent shall never deprive the Subject of his Benefit ordained for him by the Statute, tho' it were with a *Non obstante*, when *Non obstante's* were in their utmost Vigour. So for these five Reasons I hold the Action lies. 1st, Because it is a Publick Office, intrusted to them by Parliament, for the Profit and Benefit of the Subject, which in its Nature requires Care and Diligence. 2^{dly}, Because the Defendant has a Reward for his Care at the Expence of the Subject. 3^{dly}, The same Reason holds to charge them in this Case as to charge Carriers, Inn-keepers, and such like, *videlicet*, the great Inconvenience which would otherwise ensue, by Reason of the dangerous Temptation and Opportunity they would lie under to imbezil Goods intrusted to them, without Possibility of proving a particular Neglect. 4^{thly}, They are within the Meaning of 12 Car. 2. liable, and if that were not so, in this Case Defendant would be liable by his Acceptance. 5^{thly}, They might send these Things by other Messengers before the Statute, against whom an Action would lie for Miscarriage, which is taken from them by this Act; which being designed for their Benefit, it must be intended in Reason that the Statute leaves them a like Remedy. These are my Reasons, and I do not see any to the contrary.

I

Dominus

Dominus Rex versus Stukely.

HE was Coroner of *Dorsetshire*; and a Person having kill'd himself, as there was Reason to believe, feloniously, for that he had made a formal Will just before; and this Coroner having sworn the Jury to inquire, finding the Evidence given very strong, took off some of the Inquest. And *per Holt*, It is not in a Judge's Power to take off a Jurymen after he was sworn. And tho' this Coroner be a weak silly Man, yet that is no Reason why there should not be an Information against him: For such Men must learn they must not thrust themselves into Offices; and the Return of the Inquisition, finding the Deceased *Non Compos*, not being filed, it was quashed *per Cur'*. And *Holt* cited a Case of one *Tomb's*, who had killed himself at *Highgate* in the Year 1655. and the Inquest was set aside for Practice; and he said, if there be a new Inquest, it must be by those that had the View of the Corps.

Information
against Coro-
ner.
Poltea 496.

Per Holt: The Bail to the Action may plead an usurious Contract, tho' he be not privy to it. And a special Plea is no Plea till it be paid for; but if the Party accept it, without insisting upon that, it will be well.

Bail to the Ac-
tion may plead
usurious Con-
tract.
Poltea 496.

How versus Action.

PER Cur': If there be a Rule for Judgment in one Term, it must be entered before the *Effoin-Day* of the next Term; or else they must go over to the next Term by Continuance, and enter it as of the second Term.

If Rule be for
Judgment, it
must be en-
tered before
the *Effoin-day*.

Per Cur': Upon Costs being taxed by the Master, upon an Order of Reference of an Attorney's Bill, if the Costs be not paid, an Attachment shall go.

If Costs taxed
are not paid,
Attachment
goes.

Per Cur': If a Witness, which is not likely may be had at a Trial, be examined before a Judge, and cross-examined by the other Party, and his Depositions put in Writing; yet if at the Trial it be proved, that the Party might have him there, his Depositions are not to be read.

Witness.

Upon Motion to estreat a Recognizance, the other Side ought to have Notice.

Dominus Rex versus Eller.

Receiving Money on a forged Note, knowing the Forgery, is Publication of the Forgery.

IF an innocent Person receive Money upon a forged Note, not knowing any Thing of the Forgery, it is no Crime in him; but he shall answer for the Money solely: But receiving Money upon a forged Note, knowing the Forgery, is a Publication of the Forgery. *Per Holt.*

Per eundem: If Writ of Error pending, Plaintiff dies, and Execution taken out without acquainting the Court therewith, it will be set aside for Irregularity; *secus* if the Court be apprised of it.

West versus Chamberlain.

Where Original is Evidence, Copy is.

IN Debate concerning Evidence to be given about the Corporation of *Tiverton*. *Per Cur'*: Wherever an Original is Evidence, a Copy of that Original will be Evidence too; and it was also directed, the adverse Party in this Case should have Sight of the Corporation Books, and Leave to take Copies; but not that the Books themselves be produced.

Action will lie against a Sheriff for not returning good Issues.

Per Holt: Action will lie against a Sheriff for not returning good Issues upon a *Distringas*.

Holm versus Hunter.

Goods taken on a *Levari*, cannot be delivered in Execution.

IN Trespas for taking Goods, Defendant justifies by a Judgment in Court-Baron, and that the Goods were taken by a *Levari*, and delivered to him, being Plaintiff, in Execution. Demurrer; *Jud. pro Quer'*; for that Goods so taken cannot be delivered in Execution, but perhaps they might sell them, and so raise the Money, or have appraised them. Another Doubt was, whether a *Distringas*, and not a *Levari*, was not the proper Process. 3dly, Whether a Manor, *quatenus* a Manor, has a Court-Baron to hold Pleas; it is

true

true it has *eo nomine* a Court-Baron to have Suit, but it was doubted whether to hold Plea without Prescription.

Homes versus Barneham.

DEBT upon a Bond condition'd for the Payment of Debt on a Bond. twenty Pounds; upon Oyer it appeared to be *firmi-ter obligari in quadraginta liberis*, yet Plaintiff had Judgment.

Tosen versus Skipper.

Libel in Spiritual Court for calling a Woman a Whore; Words. Suit in Spiritual Court, for calling a Woman Whore in London, prohibited. and Prohibition moved for upon Suggestion of the Custom of *London* to punish Whores, and that the Words were spoke in *London*; and it was granted. And it was said that the Way of proceeding against Whores in *London*, is by Information in the Mayor's Court.

— versus *Palmer.*

IN an *Indebitat'* there were two Counts; and after Verdict and general Damages, it appeared that one of them was for Money received to the Defendant's own Use; and tho' it seemed to be a Slip of the Clerk, yet the Court held fatal. *Vide tamen* 1 *Mod.* 92. 1 *Sid.* 306. 2 *Keb.* Vide Postea in this Term, Palmer v. Stavelly. 615.

An Information was filed against a Man who set up a Lottery, and after run away without drawing it. Information against a Person who set up a Lottery.

Anonymus.

PER *Holt*: Upon a Conviction of Forcible Entry, the Justices ought to commit the Offender. If they find Force, they are upon the View to remove it, and commit the Offender, but not to award Restitution without Inquisition; and this they may do tho' the Entry be peaceable, if the Detainer be with Force, in which Case they may convict the Offender upon the View. Justices on View of forcible Entry may commit, but not award Restitution.

Atfield

Atfield versus Parker.

Executor must
plead all the
Judgments in
Force against
him.

Ante p. 153,
154, 411.

IN an Action against an Executor or Administrator, if he plead twenty Judgments, he confesses Assets for above nineteen of them; and yet they must at their Peril plead all the Judgments in Force against them; for if they fail in one of them, they shall never after take Advantage of it, for the Creditor shall have Judgment to execute when Assets come. And if the Executor plead not all his Judgments, he loses the Right of preferring them, and may be charged in a *Devastavit* for those Judgments he has omitted to plead; of which *Vide* a Case well reported in *Hutton*—— for the pleading of the Judgment is a Protection of the Assets which you have or may have, until the Judgment be satisfied. And if one pleads five Judgments, and one of them be false or fraudulent, you are saddled with the whole Debt. *Per Holt et Gould.*

Dominus Rex versus Atkinson.

Melius inquirendum cannot
be where the
Inquisition is
Virtute Officii.
Ante p. 493.

PER *Cur'*: 'There cannot be a *Melius inquirendum* where the Inquisition was *virtute Officii*. An Indictment was against the Coroner for Practice to find a *Felo de se non compos*, and Issue joined upon the Fact; and the Inquisition being brought hither, the Court stay'd the filing thereof till the Issue upon the Indictment was tried. And *per Cur'*, it is a Crime in one to take upon himself an Office he does not understand.

Ante p. 493.

Per Holt: When the Defendant's Attorney brings a Plea to Plaintiff's Attorney, and does not pay, the other may proceed as if no Plea was tender'd.

Selby versus Bank.

Modus.
Custom to pay
no Tithe of
Hay employ'd
in fothering
Cattle, ill.

BRotherick moved for a Prohibition to the Spiritual Court, the Libel being for Tithe Hay and Lamb; upon Suggestion, as to the Hay, That it was cut in a certain Waste within such a Manor; in which Manor there was a Custom, that any Thing employ'd for fothering of Things titheable should pay no Tithe, and avers that the Hay for which, &c.

was employed in foddering of Sheep. As to the Tithe Lamb, it was suggested that there was a Custom, that for all the Lambs that be yeaned there, for what Time soever the Ews were fed there, the tenth Lamb should be paid for Tithes; in Consideration whereof they were Tithe-free for Lambs of Ews that fed, but did not yeane there. And he relied on 1 Ro. Ab. 648. where such a Custom as to the second Point was held good, because, as he said, it was more than was due for Tithes of Lamb of common Right; for he said the tenth Lamb of common Right did not belong to the Parson in whose Parish they fall; but Regard will be had to the Place where the Ews are fed, and the Ecclesiastical Court will make equal Distribution between the Parishes where they were fed, and where they yeaned, which is excluded by this *Modus*.

Custom to pay
the tenth
Lamb yeaned
there, in Con-
sideration
whereof to be
Tithe-free of
Lambs which
were not yeane
ed there, ill.

Cheshire contra: The Suggestion is a plain *non decimando* to pretend to pay no Tithe Hay, because he feeds his Sheep with it; and cited 1 Ro. Ab. 650. 2 Cro. 47. Moor 683. Warner's Case. And as to the Lambs, it is very unreasonable, for thus by removing the Ews into another Parish when they begin to yeane, the Parson is ousted of his Tithes, tho' they fed all the Year before in his Parish; or suppose nine fall, he shall have nothing.

Holt: Of common Right Tithe Lamb is payable where they fall, but by Canon-Law there is a Regard to be had to the Place where they were engendred and bred. And your Custom for Hay is void, for Hay is a predial Tithe; and tho' you feed your Cattle with it, yet you ought to pay Tithe. Of Wood spent in an ancient Messuage for Husbandry, one may prescribe a *Non decimando*, for that formerly Tithe was not paid for Wood; but you cannot lay such a Custom for Corn, for Corn is a predial Tithe, but Tithe Wood is settled by Act of Parliament, to be paid only where it was usually paid: So that if there was a Custom before, the Statute does not take it away; and besides, you have not said that the Hay was Fodder to Cattle imploy'd in Husbandry, but only say that the Tithe will be the better for it. And by the Common Law Pasturage is as much tithable as Hay, but the Difference is Pasturage being taken by the Mouth of Cattle, but the Hay is tithable before it is sever'd from the Ground; Pasturage shall pay no Tithe, but the Cattle that feed it shall; but Cattle of Pale and Plow shall pay no Tithe if you feed them upon Pasture all the Year long; and the Reason of that is, for that because they are as Tools of Husbandry, by which Tithes are meli-

Hay is a pre-
dial Tithe; so
Corn.

By Common
Law Pasture
is as much
tithable as
Hay.

Tithe Hay is
due on the
mowing it.

orated. And no Tithe is originally due by Law in that Case, but Tithe is originally due upon mowing of the Grass; and your subsequent Application of it, tho' to Cattle of Pale and Plow, shall not discharge you of a Charge to which you were liable before upon the mowing. And the Grass is tithable only in respect of the Feeding, that is, the Use and Application makes it tithable; and for that you cannot have any other Tithe than from the Profit of the Cattle that do feed it.

And as to the other Point of the Lambs, one Tithe in *Specie* cannot be a Discharge of another Tithe in Kind; and tho', as I said before, Tithe Lamb is to be paid where they fall, yet by the received Canon Law there is Regard to the Place of Feeding; and *Marsh* 79. 1 *Mod.* 239. were cited. And after Consideration the Court declared at another Day, that no Prohibition should go in either Part; for as to the Lambs, it is a dangerous Custom, because easily converted into Fraud, by taking the Sheep away in Yeaning Time. And the other Point is clear upon the Case put out of *Cro. Jac. &c.* and After-Math of Common Right is tithable, and no Prohibition. *Per totam Curiam.*

Note; Per Holt hic: One is not bound to pay Tithe Lamb if he has any Number under ten, because they are entire Things; but if he has nine Pounds of Wool, he shall pay Tithe for it, *viz.* by an inferiour Weight, as by Ounces, for that is divisible.

Dominus Rex versus Dillon.

Sessions may
order Dis-
charge of Ap-
prentice, and
also to refund
money receiv-
ed.

Salk. 67.
Postea in this
Term, Dom'
Rex, v. John-
son, &c.

AN original Order of Session was made upon him for discharging his Apprentice from him, pursuant to the Statute of 5 *El. c. 4. § 35.* and ordering him to refund some of the Money he had received with him: And 1st, It was objected, they had no Power by the Statute to order refunding of Money, but only to discharge the Apprenticeship; and that upon Inrollment of the Discharge the Indentures are defeated. But it was ruled, that clearly they have Power to award a Restitution by necessary Consequence; for suppose he had brought a considerable Sum, and had served but two Months. 2^{dly}, It was objected, That they had no Power to make an Order, but upon Appearance of the Master upon a Summons, which is not shew'd to have been here. *Answe.* The Words are indeed, *That they shall make Order on Appearance*; but it were hard to construe it that they shall

not meddle if he will not appear, for then he would take Advantage of his own Wrong; but it ought to appear that he was summon'd or warn'd to appear. 3^d Exception was, That it appeared this was originally begun at the Sessions, whereas they have no Jurisdiction till after Application to the principal Magistrate of the Corporation, or to a Justice of Peace: And of this Opinion was *Holt*; but upon Consideration, because the Precedents went the other Way, he gave Way to them; and the Order was confirm'd. Vide 1 Vent. 175.

Dominus Rex versus Orbevill.

HE was indicted for fraudulently, unlawfully, and for wicked Gain to himself, procuring another to lay Money upon such a Match; and tho' it had many apparent Faults in it, yet being a Cheat, the Court would not quash it upon Motion. Indictment for a Cheat not quash'd on Motion.

Per Cur': In the Case of *Procter* and *Johnson* there is this Diversity between a *Sci. Fa.* upon Judgment in Debt, and in Ejectment; for in the last the Party may controvert the original Title. In *Scire Facias* on Ejectment the Title may be controverted.

Dominus Rex versus Raw.

IF impertinent Interrogatories be put to a Person who is ordered to answer Interrogatories, his Way is to demur to them; for there is no Way but to answer, or demur: And there ought not to be an Interrogatory leading the Party to a Penalty. If Interrogatories are impertinent, may demur to them.

Parker moved for an Attachment against an Officer for executing, by Distress, an Order of Justices for levying of Money for Repair of a Bridge, after the Order was removed by *Certiorari*. *Holt*: There never is any formal Allowance of a *Certiorari* below; but to bring one in Contempt, the Distress must be after the *Certiorari* presented below; and if a Warrant were delivered before that Time, the Way had been, upon producing the *Certiorari*, to get a *Supersedeas* of it, and deliver it to the Officer, or else he cannot be in Contempt. *Certiorari* must be deliver'd before any Contempt.

Dillon

Dillon versus Crawly.

Evidence.
Owning a
Deed is good
Evidence.

ERROR of a Judgment upon a Demurrer to Evidence in *C. B.* the Witness to the Sealing and Delivery of a Deed, being subpoenaed, did not appear. But to prove it the Party's Deed, they proved an Indorment made by him thereupon three Years after; reciting a *Proviso* within, that if he paid such a Sum the Deed should be void, and acknowledging that the said Sum was not paid; and a Fine was levied of the very Lands mention'd in the Deed to *Crawly*, and by the Indorment he expressly owned it to be his Deed; and upon this the Deed was read. And now it was objected, that this was not good Evidence, because not the best the Nature of the Thing could bear, but only circumstantial; which never ought to be admitted, where better may be had *ex natura rei*, because Circumstances are fallible and doubtful; and it is upon this Reason that a Copy of a Record is good, because one cannot have the Record it self; but a Copy of a Copy will not do. Upon *Non est factum* to a Bond, one of the Witnesses being subpoenaed did not appear; and it was offered to prove that he owned it his Bond, but denied. *Holt*: Can there be better Evidence of a Deed than to own it, and recite it under his Hand and Seal? *Et per totam Cur', Jud' affirm'.*

How versus Acton.

Writ of En-
quiry.

PER *Holt*: If Plaintiff delay the executing a Writ of Enquiry, till a Year after the interlocutory Judgment, he cannot do it after without a *Sci' fac'*.

Reek versus Thomas.

Administra-
tion during
minoritate of
Executor, de-
termines at se-
venteen, of
Administrator
at twenty-one.

DEBT upon a Bond by Administrator *durante minoritate* of one intitled to be Administrator as residuary Legatee; averring, that the said Person was under twenty-one Years; Defendant demurs, because, as appeared by his Averment, his Administration was determined, or at least might be so; for if the Legatee were of seventeen Years of Age, tho' under twenty-one, as it was pretended, the Administration of the Plaintiff would cease; like to Administration *durante minoritate* of an Executor.

But it was resolved, that there is a great Difference as to this Point, between Administrator during Minority of one intitled to be Administrator as residuary Legatee, or other Person, and when it is during Minority of an Executor; for in the last Case the Administration determines immediately upon the Executor's arriving at seventeen, and the Infant is *ipso facto* Executor before to all Purposes, but to bring Action. But in the other Cases the Administration does not determine till the Legatee or other Person's Age of twenty-one; and there must be an Act done before the Legatee is intitled to administer; and this is the Practice in the Spiritual Court; *vide Atkison v. Cornish*, and *Dubois v. Dubois*, Mich. 10 W. 3. So note the Diversity; for when it is granted during Minority of such a one Executor, that is, during his Minority *quatenus* Executor, which is till seventeen; but when it is during Minority of *7. S.* or residuary Legatee, that is till the legal Age of twenty-one. And there is an Interest vested in the Administrator by Act of Parliament, upon the Grant of the Ordinary; so that if it be during the Minority of one appointed Executor, his Time to administer is till seventeen, and when that comes his Authority ceases: But in the other Case the Sense of the Word *Minority* is left to Construction upon the Act of Parliament, and that must be according to Common Law of legal Age. *Jud' pro Quer'.*

Ante p. 194.
438.

Ante p. 438.

Per Cur': It has been held once, that if the Plaintiff had been *Non prof'd* in a former Action, that if he began again he should have but common Bail; but this has not been abided by, but a *Non prof.* in a former Suit is Evidence of a vexatious Prosecution.

Spuraway versus Rogers.

A *Capias* was returnable the first Day of *Hill*. Term, and the Afternoon of that Day a Writ of Error was brought returnable *in Cam' Scacc'* the next Day. *Holt*: It has been a *vexata questio*, whether the Suing out the Writ, or the Notice thereof to Plaintiff or his Attorney, were what superseded the Execution; if the Writ be tested after Return of the *Capias* it does not supersede it. If a *Capias* be out, and Execution thereon, and then Writ of Error, it shall not discharge the Execution. And the antient Opinions have been, that a Writ of Error is a *Supersedeas* from the

Ven. 30.

Salk. 321.

6 Mod. 130.

Whether suing

out a Writ of

Error, or the

Notice of it,

be the *Super-*

sedeas.

actual purchasing of the Writ, but that the Party shall not be punished for executing it till Notice, but that still it avoided the Execution. And if a *Capias* be taken out and executed within four Days after Return of the *Postea*, it is ill; *secus* if taken out within the four Days, and executed after; and if there be not four Days in Term after Return of the *Postea*, they must be made up in Vacation before Execution executed. But *Note*; *Clark* the Secondary told me, that a Writ of Error was not a *Superfedeas* till a Certificate taken out from the Clerk of the Errors and served on the Party. *Parker v. Woolaston*, 6 Mod. 130.

Dominus Rex versus —.

Where a Thing is a Crime at Common Law, and made more penal by Statute, may be indicted either generally or particularly.

Ante p. 446.

Indictments for Publick Offences not quashed on Motion; *aliter* of inferior ones
Ante p. 99.

Indictment for a Riot concluded *contra formam Stat'*, and the Exception, that a Riot was a Common Law Offence, indictable *independenter* of any Statute; *ergo* the Conclusion was ill. *Holt*: Tho' it be not made an Offence by any Statute, yet divers Statutes there are directive of the Manner of punishing of it, and that is Reason enough to make the Conclusion good. As upon the Statute of Stabbing, the Thing was Felony before, but Clergy is ousted by the Statute; and yet Indictment for that Sort of Felony does conclude *contra formam Stat'*; tho' the Statute does not make the Offence, for it was Felony before; on the other Hand, an Indictment would be well without concluding upon the Statute in that Case; so both Ways are good. So in case of Barretry, you may conclude an Indictment *contra formam Statuti*, or *diversorum Stat'*, or take no Notice of any Statute at all; for wherever there was an Offence at Common Law, and a Statute makes a further Provision of Penalty, an Indictment for that Offence may conclude *contra formam Stat'*, or leave it out, at Election. Another Exception was, that it was not said in the Caption, that the Jury were *Furat' & onerat'*, *ad tunc & ibidem*; but no Heed was taken to it. And *Holt* further said, that it was not usual to quash Indictments for a Nufance, Riot, or any other Publick Offence, on Motion; but in case of Petit Riots, upon a Contest of Right of Common, it had been often done.

Atkinson versus Morrice.

IN Case for so much Money promised for the Use of a Coach and Horses for a Year; upon the Evidence before *Holt* at *Guild-hall*, *M.* agrees to give *A.* so much for the Use of a Coach and Horses for a Year; and *A.* agreed further with *M.* to keep the Coach in Repair; it was averred, the Coach and Horses were delivered to *M.* but nothing of the Repair; and *Holt* held, upon this Evidence, that repairing was not a Condition precedent, and therefore need not be averred; but if the Agreement had been, that *A.* had agreed to give *M.* a Coach and Horses for a Year, and to repair the Coach, and that for that *M.* promised so much Money, then the Repairing had been a Condition precedent, necessary to be averred. And tho' in this Case it was not expressly averred, that *M.* had the Use of the Coach for a Year; yet it being said it was delivered to him, it shall be so intended, if contrary be not shewn of Defendant's Side. And *Jud' pro Quer'* above.

Condition precedent.
Ante p. 455.

Per Cur': Where a whole County is concerned in a Trial, as in an Information for not repairing a Highway, or a common Bridge, the Trial shall be by a Jury of a neighbouring County; and a Suggestion must be made upon the Roll of the Cause of its being tried in another County, *viz.* that it concerns the whole County.

1 Vent 61.
6 Mod. 191.
Where a whole County is concerned in a Trial, it shall be of a Jury of a neighbouring County.

Vezey versus Smith.

IN *Debit'* for Goods sold and delivered, against a Woman, who pleads in Abatement Coverture at that Time; Plaintiff replies, that she was Sole, and not Covert, and concludes to the Country; and it was objected, that the Replication was ill; for that it should have been taken with an *Absque hoc*, that she was Covert, and not as here, and not Covert. And the Case 1 *Saund.* 21. was quoted, and 6 *W.* 3. *Nichols v. Baw*; in Debt upon a Bond the Defendant pleaded, that the Plaintiff was an Alien Enemy; Replication, that he was born in *England*, and not an Alien, without laying any Place for *Venue* but as here; but they could not tell the Judgment of that Case.

Plea of Coverture: If in Abatement, need no *Venue*; if in Bar, must be laid at a certain Place.

Holt;

Holt: If such Plea be to a Writ, it need no *Venue*, but may be tried where the Writ is brought; but if it be pleaded in Bar, there must be a Replication, and that must set forth the Place of the Party's Birth in *England*, from whence a *Venue* may be; and tho' Precedents be both Ways, yet this is a true Difference, and according to *Co.* —. and he said, the Defendant must shew and prove the Coverture; and saying in the Replication that she was Sole, implies the Negative of a Marriage, as much as that she was not Covert; and it is the same as pleading of Infancy. If this had been a Bar, the Marriage must have been laid at a certain Time and Place; but being in Abatement it is well generally; but even there the Husband's Name ought to be shew'd, that the Plaintiff may know whom to have his Writ against.

Vide the first Case in the next Term.

If Rules for Pleading be not out, may plead in Abatement.

Master and Servant.

Per Cur': Tho' a Declaration be delivered as of a Term before, yet, if the Rules of Pleading be not out, one may plead in Abatement the subsequent Term.

Per Holt: A Lieutenant of a Man of War may give moderate Correction to a Seaman, but not wound him, for that is not moderate Correction.

Anonymus.

Indictment.

Indictment, concluding *ad nocumentum* of Inhabitants of a certain Vill, was quashed for the special Conclusion.

Parish, what.

Per Cur': A Chapel's having Sacramentals only, makes it not independent of the Parish, but it must have all other Badges, as Sepultures, &c.

In Communi Banco.

Bond for Resignation of a Benefice, good.
Cro. Car. 180.
1 Jones 220.
Hutt. 111.
1 Vern. 411.
Prec. Chan.
513.
2 Chan. Rep.
398.

THE Case was Debt upon a Bond for a great Sum of Money; the Defendant pleaded, that the Condition was for a Parson's resigning his Benefice, and on Demurrer. And *per Powell & Blincow*, being only in Court, *Jud' pro Quer'*. *Powell*: I am of Opinion, that when first the Judges have held these Bonds good, if they had foreseen the Mischief of them, they would have been of another Opinion; but now that Opinion has prevail'd, and it is supported only by the Possibility, that it may be to an honest Intent;

Intent; as that the Patron may have a Son of his own capable of the Benefice; or that he should voluntarily resign in case of Non-residence, which may rather argue Care in the Patron, than any Corruption of Simony; but if these were the real Motives, why should they not be specially expressed in the Condition? But such a Bond as this is to resign generally; it may be the Parson could not have the Benefice without it, he is thereby tempted to strain a Point rather than be without a Living, and the common Use of them is to have the Money; and sure if the Thing be Simony, a Bond for it will be void. And my Lord *Coke's* Notion is not Law, where he says, that since the Bonds are good, there shall be no Averment of Simony upon it. 31 *El.* makes the Church void, and gives the Presentation to the King; and Simony was against Law before, and Simoniacal Agreements were void before that Statute, tho' Simony itself was only punish'd in the Spiritual Court. And he said the Case of *Gregory* and *Oldbury* was not Law, *Moor* 641. where an Averment of its being a Simoniacal Contract, and the Patron and Incumbent are Privies to it; and if there be any Simoniacal Consideration, they both must know it. And he quoted a Case, where in an Action upon such a Bond the Defendant brought the Plaintiff by Bill into Chancery; and because he could not give a good Account of the Cause of taking such a Bond, a perpetual Injunction was granted. But here we cannot set aside this Bond without a special Cause shew'd in Pleading, which is not done.

Blinco: You assign no Simony, but put it upon the Plaintiff to shew none, which he need not do, because we cannot intend it to be such, since it may be otherwise; and here is a particular Circumstance why it should not be thought Simony here, because it is in a Sum much above the Value of the Benefice; if indeed it had been for a Sum of less Value, it might be intended perhaps the Parson would rather pay it than resign. And he remembered Justice *Twissden* said he had known such a Bond held good twelve Times; so it would be hard to oppose it now, there appearing no Simony in the Condition, the Defendant not averring any.

Walker versus Humphry.

Process must
have Continu-
ances, but
Writs of Exe-
cution need
none.

F*ieri Facias* was taken out in *Hill*. Term, returnable *tres Mich.* and the Court being acquainted with it, order'd they should shew Cause why it should not be superseded; for this would take away all Renewal of Process. And *per Cur'*, *Capias* of Process must have Continuances, and for that must be from Term to Term; but Writs of Execution need none, and for that may have a longer Return.

Pell versus Garlick.

In Trespas,
Justification
without shew-
ing the Com-
mencement of
his Estate, or
that Freehold
was in him:

IN Trespas for breaking the Plaintiff's Close, and keeping and impounding his Horses, and for breaking a Close called *Old-Ground* in such a Vill; the Defendant pleads to Issue as to the *Vi et Armis*, and as to the taking of the Horses, that he was possessed of a certain Close called *A.* and found the Horses there Damage feasant, and for that took and impounded them; and *quoad residuum transgressionis*, that there were many Closes in that Vill call'd *Old-York-Close*, but none without a further Addition. That the *Locus in quo* was call'd *Talden Old-York*, and that the Defendant was seized thereof in his Demean as of Fee; to which there was a Demurrer: And *Cartbew* for the Plaintiff maintained the Demurrer, for that the Defendant justifies by his Possession, without shewing the Commencement of his Estate, or that the Freehold was in him: And it is a Rule, that any Man that makes a Title to himself by a particular Estate, or would justify under it, ought to shew the Commencement of it, that the Party may thereby have an Opportunity to traverse it. 1 *Inst.* 303. *b.* *Mar.* 1. *Cro. El.* 171. *Cro. Ca.* 138, 139. But it is insisted on, that this is an Exception of the said Rule, and that the Plaintiff could not take Issue upon the Commencement of the Title here, if it had been set forth; but against that he quoted the Case of *Saunders v. Hussey* in this Court, *Trin.* 8 *W.* 3. *rot.* 336. and *Silly* and *Dallye's* Case in *B. R.* 9 *W.* 3. *rot.* 747. both in Avowry, which he said was much stronger than this, an Avowry being in Nature of a Declaration. Another Exception was, That the Defendant justifies in another Close than where we lay the Trespas, and laying the Freehold in him-

Ante p. 191,
and Salk. 562.

himself, he might have pleaded not guilty; and as they have pleaded, they leave nothing for us to reply, without departing.

Lutwich contra: The justifying by a *Possessionat' fuit*, without more, is well in this Case, tho' I agree it would not be so in an Avowry, because that comprehends a Title in itself, but this is in Trespass for Goods taken in *D.* which must be intended a Vill; and he took this Diversity; if the Plaintiff had declar'd *quare clausum ipsius quer' fregit*, this Plea had not been good, because the Declaration lays the Possession in the Plaintiff; but here it is generally *quare clausum fregit* in *D.* leaving it indifferent whose Close it was. So, for any Thing appears in the Declaration, the Title is collateral, and will not come in Question; and for this he quoted 2 *Mod.* 70. *Serle v. Puddian.* 3 *Mod.* *Langford v. Wells*; and this Diversity he insisted on to be a good ingenious one; for if the Defendant has Possession, why may he not justify by Virtue of it? but where the Plaintiff alledges it to be his, as in a *quare clausum ipsius quer' fregit*, there the Defendant must answer that Allegation, and therefore must shew his Title, and cannot shew a Possession without shewing the Commencement of it; and the Reason of the Diversity is, because in the one Case the Title of the Land comes in Question, in the other not. And he quoted *Cro. Ca.* 138.

And as to the other Point, it is well enough, for we say there were several Closes call'd *Old-Ground*, but none without a further Addition; and this is only Inducement to our Plea. *Mo.* 25. In Detinue for Goods bail'd, it was pleaded, That after the Bailment the Plaintiff married *J. S.* who releas'd to the Defendant, and held not to be double, for he could not plead the Release without shewing the Marriage. 5 *H.* 7. 38. A Rule is laid down, that when a Man has two Matters; he may plead either of them; and if he cannot come at one without alledging the other, the alledging it will not make his Plea double. *Vide Gouldsbrough* 88. *Br.* double Plea.

And as to the Objection, that the Plea is the General Issue. It is no more than the common Bar of *Liberum tenementum* to inforce the Plaintiff to give a more precise Certainty of the Place where the Trespass is supposed; for if he had said that the Trespass was in *Black-Acre*, we could not plead that it was in *White-Acre*, tho' *Litt.* and *Brook* in 21 *Ed.* 4. be of a contrary Opinion; but the Matter of Inducement here is consistent with the Declaration of the Plaintiff, for the Defendant admits there are
many

many Closes in *Dale*, called as the Plaintiff shews, but he says they have all Additions; and then it is necessary to give further Certainty, so that we may know which of them to plead to. And several of these Closes may be the Plaintiff's, and we may be Not guilty as to one of them, have a Release as to another, and plead an Accord with Satisfaction to a third; and this we cannot do without the Plaintiff assigns a further Certainty. 21 *Ed. 4.* 80, 81. Trespas laid in two Acres of Land in *D.* the Defendant pleads that the Place where was called by such a Name, and pleads to it; and tho' it was held the Declaration had sufficient Certainty *prima facie*, yet it was held the Defendant might give particular Names to them for greater Certainty; and the Reason is, for that the Plaintiff might be seised of six Acres, of which two might be call'd by one Name, two by another, and two by a third Name; and the Defendant might have committed Trespas in every one of them, and he ought to know for which of them the Action is brought, that he may distinguish what Plea to make. And here calling the Place, in which the Trespas is laid, *Old-Ground*, is not so certain, but it may be more certain; and such Plea can be no Harm to the Plaintiff, for if he prove Trespas in any of them, besides where the Defendant justifies, he shall recover; and if it be only where he justifies, he may controvert the Cause of Justification. *Vide 9 H. 6.* 5. Trespas in *D.* without Addition, and there is no *D.* without Addition; yet if he prove Trespas in *D.* it will be for him.

In Assize and Trespas *Liberum Tenementum* is a good Plea, but not where there is a special Assignment.

6 Mod. 117.
Dyer 23.
2 Cro. 59.
Cro. El. 137.
Rast. 548.
Liberum Tenementum is traversable.
Possession without more, cannot be pleaded in Bar, except in Case of Battery.

Powell, Justice: In Assize and Trespas, which are general, the Law allows the general Plea of *Liberum Tenementum*, and that is the common Bar; but it will not do where there is a special Assignment; but the Use of it is to enforce the Plaintiff to make his Charge certain, and it is only a favourable Plea; for the Plaintiff may have a Title, of Lease suppose, consistent with the Plea; so if he has such special Title, that Plea affords him an Opportunity of shewing it, and *Liberum Tenementum* is traversable; and besides, if the Plaintiff has any other Plea, he may come with a *bene et verum est*, that it is the Defendant's *Liberum Tenementum*, and shew his special Cause of Action; so where the Defendant pleads *Liberum Tenementum*, he gives a Plea traversable; but the Plea here tender'd is not traversable, and yet it puts him to make his Title, which ought not to be without allowing him a traversable Plea; and besides, the Title may come in Question upon the taking of Goods. And one cannot plead his Possession in Bar without more, except it be in the Case of Battery, where

where it may be meerly collateral; and the true Diversity is between a Declaration and a Plea, for one may count upon his Possession without more, but not justify by Virtue of it; for you can never give Possession in Bar without making a Title. As to the other Point, it is very true, when a Trespass is laid in a Place certain, it bars the other from saying that it was in another Place; but here he does own there is such a Place, but that it has an Addition; but why should not you confess the Declaration, and give in Evidence a Trespass done in *Old-Ground*, with the Addition. *Yelv. 166.* And *per Cur' Jud. pro Quer' nisi.*

One may count on Possession without more, but not justify without making a Title.

Yelv. 166.

Per Powell: If *A.* promise *B.* ten Pounds, in Consideration that he would procure him one who would give him an Annuity of 100 *l.* *per Ann.* for 900 *l.* *B.* does not do it, but procures him one who grants it for 1000 *l.* and *A.* does agree for that Annuity. *B.* cannot bring an *Assumpsit* for the ten Pounds, because this varies from the Contract; but he may have a *Quantum meruit.*

Assumpsit must be on the particular Contract.

At Nisi prius at Guild-Hall coram Holt.

IN Account the Case on Evidence was this; *A.* gives a Note to *B.* upon *C.* for *B.* to receive it for the Use of *A.* *B.* owes *C.* Money, and *C.* upon this Note discharges *B.* thereof; whereupon *A.* brings his Action against *B.* and it lies. *Per Holt:* If *A.* be intrusted with the Money of *B.* to lay it out, and *A.* lends it to one who passes for a substantial able Man at that Time, and takes a reasonable Security for it, as his Bond, &c. and after the other becomes insolvent, *A.* shall not be charged.

Account.

An Indictment was against several of the Boys of *Christ's-Hospital*, for a Riot upon the Prosecutor; it was proved that two of them beat her, and the rest only hollow'd. And *per Holt*, as many as hollow'd are Abettors, and therefore Principals in the Case: But the Jury acquitted all but two, wherefore the Plaintiff's Counsel desir'd they should be all acquitted; for two alone cannot be guilty of a Riot, but there must be three at least, and Battery cannot be found upon this Indictment.

Two cannot be guilty of a Riot.

A. draws a Bill of Exchange in Payment, and the Party does not call for the Money from the Drawee in convenient Time, and he fails, he shall then come upon the Drawer. *Sed vid' coment ante 408.*

Ante p. 203.

Dominus Rex versus Policarpum Wharton Mil^l et alⁱ.

Brid. 47.

A Thing that will be a Nufance, cannot be abated till it be actually so.

If the Owner of a River neglects to scower it, by which Land is overflown, it is indictable.

INDICTMENT was for Riot; but the Cause of the Riot being the Right of a private River: And *per Holt*, if a River runs contiguously between the Land of two Persons, each of them is Owner of that Part of the River which is next his Land of common Right; and may let it to the other, or to a Stranger. 2^{dly}, If one sees his Neighbour erecting a Thing which will be a Nufance, he cannot abate it till it become an actual Nufance; so the Maxim of *præstat cautela quam medela* holds not in this Case. 3^{dly}, If one has a River, and for want of Scowring it the neighbouring Land is overflown, he is indictable for it. 4^{thly}, Unlawful Assembly, Riot, and Rout, are three different Offences.

Palmer versus Starvelly, in B. R.

Indebitatus for Money received to the Use of Defendant helped by Verdict.

CASE upon two several Promises, and a Verdict on both; the first Declaration was very special, setting forth, 'That the Defendant did set up a Lottery, and a Fraud in the managing it. The second was an *Indebitatus* for Money received by the Defendant for the Plaintiff, and laid *ad usum* of Defendant; and this being moved in Arrest of Judgment, for *Assumpsit* lies not for Money received by one to his own Use.

Ante p. 495. Verdict helps such Faults as must be given in Evidence to obtain a Verdict.

Ante p. 422.

To which it was answered, That this being after Verdict, to understand it according to the Words of the Declaration, would directly contradict the Verdict; and saying that it was for Money received for the Plaintiff, was sufficient, without saying *ad usum*, &c. and therefore the *ad usum* superfluous, being contradictory, ought to be rejected. *Vide* 1 *Mod.* 92. *Nosworthy's* Case in Point. And it was laid down for a Rule, That whatever Imperfection there be in a Declaration, if it be such as must necessarily be given in Evidence to obtain a Verdict, it shall be cured by the Verdict. And the Case of *Paterfon* and *Milton* was quoted, where the Declaration was, that the Plaintiff was indebted to the Plaintiff, and that the Defendant promised to pay; and held good after Verdict. 1 *Sid.* 306. That the Defendant being indebted to the Plaintiff for Goods sold and delivered, the Plaintiff promised to pay to the Plaintiff, good after Verdict. 2 *Keb.*

615. Plaintiff declared, that the Defendant was indebted to him in fifty Pounds, for Money had and received to the Use of the Defendant; and after Verdict the Plaintiff had Judgment.

But to this it was objected, That it is very true the Court may reject Words that are repugnant in themselves, and inconsistent to what went before; but they cannot reject Words repugnant or destructive of what went before, if they are sensible: And here it is good Sense to say, that the Defendant received Money for the Plaintiff to his own Use; as if the Plaintiff ought the Defendant ten Pounds, and J. S. ought the Plaintiff ten Pounds, and the Plaintiff appoints the Defendant to receive the ten Pounds from J. S. for his Debt; that would be Money received by the Defendant for the Plaintiff, to the Use of the Defendant. But it was replied, If that were the Case, the Jury could not have found for the Plaintiff.

Holt: In Debt one never lays a Promise, but only the Debt; but in *Assumpsit* there is a Contract in Law to pay what you received to another's Use. And tho' a Promise be laid ever so express, yet if you do not shew the Cause of the Promise, it will not bear an *Assumpsit*, tho' you give ever so just a Debt in Evidence; because it may be Debt by Specialty, or a Rent, whereof *Assumpsits* do not lie, if it be not for Forbearance of the Payment after it is due. So it will not be enough to say, That the Defendant being indebted to you in so much Money, he promised to pay you, even after Verdict; and here *Jud. nisi pro Quer', per Cur'*. And *Holt* informed the Court that he had bound the Defendant to his good Behaviour, for cheating the Publick, in getting their Money into his Lottery, and running away without drawing it.

In *Assumpsit* the Cause of the Promise must be known.

Ante p. 16.

Ante p. 495.

Per Cur': An Heir sued as such, shall no more be held to Bail by Heir, special Bail than an Executor.

Dominus Rex versus Sims.

IF one brought in, in Contempt, deny all upon Oath, he is of Course discharged of the Contempt; but if he has sworn himself, he may be prosecuted for Perjury. *Per Cur'*.

If Contempt be sworn off, he is discharged of Contempt.

Per Holt: A Master of a Ship may keep the Goods till he be paid his Freight, but if he once parts with the Possession of them, he cannot retake them.

Master of Ship may retain for Freight. Ante p. 447.

Per

Party oppress'd, good Witnesses in an Indictment for it.

Per eundem: In Indictment for Oppression, Battery, &c. the Party oppress'd may be a Witness. And a Justice of Peace's Clerk may commit an Extortion.

Warranty collateral was for the Security of Purchasers at Common Law, and there was then no need of Lineal Warranty.

Common Recoveries, not upon Supposition of Recompence, but never were within the Statute.

Per Holt: The true Reason of collateral Warranty was the Security of Purchasers, and for their Encouragement; as also for the establishing and settling the Estates of such as were in by Title, or Descent cast; and this was the only Security such Persons could have at Common Law. And because the Estate of such Persons, as are in by Title, are much favour'd in Law, these Covenants that were for strengthening of them were favour'd likewise. And in those Days there was no need of a Lineal Warranty; but however the Force of that is taken away by the Statute of *Donis*; and common Recovery is not upon the Supposition of Recompence in Value, and never was within the Statute; but always as much out of it as if it were so mention'd by express Words. And this he said was my Lord *Hale's* Opinion.

Mitchel versus Harris.

Salk. 71. S.C. Ante p. 120. Submission to Award of *A.* and *B.* if make their Award by such a Time; if cannot agree, to Umpirage of such as they should choose; Umpire may make Award within the Time.

DEBT upon an Award, setting forth a Submission to the Award of *A.* and *B.* provided they made their Award by such a Day; and if they did not agree, to the Umpirage of such as they should choose; *nul Award* pleaded. *Repl.* Confess'd that there was no Award, but that the Arbitrators had chose an Umpire on such a Day, which appeared to be within the Time allow'd them to make their Award in; and sets forth the Umpirage and Breach. *Rejoind.* That they had not chose any Umpire after the last Day which was allow'd them to make their Award: To this a Demurrer.

And it was objected, That it appeared the Arbitrators had chose their Umpire too soon, *viz.* within the last Day allow'd themselves for making their Award as Arbitrators; and such Choice was void, for they could not choose an Umpire till their own Authority were determin'd; for notwithstanding such choosing of an Umpire, they might make an Award after any Time before the End of the Time allow'd them.

But it was answer'd, That by this Submission the Arbitrators had Election to make an Award, or to choose an Umpire by

by such a Day, and that by choosing the Umpire before the Day, they had determined their Election, and gave the Authority to the Umpire. And *Holt* quoted the Case of *Twisselden* and *Travers*, where the Submission was to the Award of two, so that they made their Award before *Midsummer*; and if they could not agree, to stand the Umpirage of such as they should choose, so as he made his Umpirage before the said *Midsummer*; and they chose an Umpire, who made an Umpirage before *Midsummer*, and held good; because by the naming an Umpire they had determined their Authority and Election. But if the Submission had been to the Award of *A.* and *B.* so that they made an Award before *Midsummer*, and if they did not agree, *J. S.* should be Umpire; they do not agree, *J. S.* makes an Umpirage before *Midsummer*, that Umpirage is void. And *Jud' nisi pro Quer'.*

Nota diversitas tem.
Otherwise if a particular Person be named in the Submission.

Calladay versus Pilkinton.

IT was doubted, whether a Gaoler could detain a Prisoner, discharged by the late Statute for Relief of poor Prisoners, for his Fees. And it was said, that *Treby C. J.* of the Common Pleas held he might; for the Act being for giving away the Right of the Subject, it ought to be construed strictly. And *per Holt*; Let an Act of Parliament be ever so charitable, yet if it gives away the Property of the Subject, it ought not to be countenanced.

Gaoler may detain a Person, discharged on the Act for Relief of poor Prisoners, for his Fees. Act, which takes away the Property of Subjects, not to be countenanced.

Per Holt: It was resolved on solemn Argument, in the Case of *Smith v. Barnaby*, that if one by Will devises a Rent-charge to *A.* in Tail, the Remainder to *B.* in Tail, and *A.* suffers a common Recovery to the Use of *J. S.* and his Heirs, and dies without Issue, the Remainder is barr'd.

Remainder in Tail of a Rent-charge may be barred by Recovery.

Per Holt: In Debt, if the Original be recited to be *Attachiatus*, instead of *Summonitus*, yet we cannot reverse the Judgment, because it is only a Recital.

Wrong Recital no Error to set aside a Judgment.

— versus *Saunders.*

TRespafs for entring into the Plaintiff's House, and keeping the Possession thereof for so long; Defendant pleads that *J. S.* was seised in Fee thereof, and he being so seised gave Licence to the Defendant to enter into and possess the

General Issue should be pleaded, or Colour be given.

Ante p. 97,
101, 121,
376, 377.

said House till he gave him Notice to leave it; that thereupon he entered and kept the House for Time mentioned in the Declaration, and had not any Notice to leave it all the Time; and a special Demurrer, because the Plea amounted to the General Issue. And *per Cur'*: He might have given this Matter in Evidence against all People, except *J. S.* but against him he must have pleaded it. So he should here either have pleaded the General Issue, or given Colour to the Plaintiff. *Ergo Jud' pro Quer'.*

Dominus Rex versus Russell.

Indictment.

HE was indicted for opening a Letter sent by the Post, and the Caption was, that *per Juratores jurat' pro Domino Rege extit indictam'*, and quashed for that.

Indictment will not lie before Justices of Peace, where Act appoints a Penalty to be recovered by Bill, Plaint or Information.

Indictment upon the 35 of *El. c. —*. for making Cables of old Stuff, concluding *contra formam Stat'* generally; and the Penalty given by the Statute is four Times the Value of the Cables, to be recovered by Bill, Plaint, or Information; and it was quashed *nisi*, upon this Exception, that the Justices of Peace have no Jurisdiction given them by the Statute, and the Indictment was taken before them at their Quarter-Sessions. So in Case of an Indictment upon the Statute of Usury against the Lender; as was adjudged on Writ of Error, *Trin. 4 Ann.* in one *Smith's* Case.

Dominus Rex versus Lee.

Words spoke of a Justice of Peace.

LEave was moved for to have an Information filed against him for these Words spoke of a Justice of Peace, *He is an Old Rogue for sending his Warrant for me. Holt*: He deserves to be bound to his Good Behaviour; tho' it be not proper for that Justice to do it, but rather to get one of his Brothers to do it for him; and Leave was denied; the Court desiring them to go by Way of Indictment, if they would.

Factor of common Right is to sell for ready Money, unless the Usage be otherwise.

Per Holt, at Guild-hall, every Factor of common Right is to sell for ready Money; but if he be a Factor in a Sort of Dealing or Trade, where the Usage is for Factors to sell on Trust, there, if he sells to a Person of good Credit at that Time, and he after becomes insolvent, the Factor

is

is discharged; but otherwise if it be to a Man notoriously discredited at the Time of the Sale: But if there be no such Usage, and he, upon the general Authority to sell, sells upon Trust, let the Vendee be ever so able, the Factor is only chargeable; for in that Case, the Factor having gone beyond his Authority, there is no Contract created between the Vendee and the Factor's Principal; and such Sale is a Conversion in the Factor; and if it be not in Market-overt, no Property is thereby altered, but Trover will also lie against Vendee: So likewise if it be in a Market-overt, and Vendee knows the Factor to sell as Factor.

In Case, for a false Return to a *Mandamus*, for restoring
 ——— to an Office in the Corporation of *Orford*, which
 having Influence on Election of Parliament-men, the two
 Factions of *Whig* and *Tory* were deeply engaged in it, and
 the whole County divided in it; and the Action being laid
 in *Suffolk*, it was moved at the Bar to have it laid in an-
 other County, to preserve the Peace and Quiet of *Suffolk*.
Per Cur': It is a good Cause to change a *Venue* to preserve
 the Peace of the County; but this Action being a local
 one, must in its Nature be brought either in *Suffolk*, where
 the false Return was made, or *Middlesex* where it appeared
 on Record; and the Plaintiff has his Election, by Law, of
 the two Counties, and Court cannot lay it without his Con-
 sent in either of the two Counties; for it consists of two
 Falsties, of the Fact, and the Falstity of returning it on Re-
 cord. It was agreed, that in transitory Actions the Plaintiff
 has not a peremptory Election, but the Defendant might
 transfer it to the right County, unless the Plaintiff would be
 bound by Rule to give material Evidence of some Fact in
 the County where he laid it. And my Lord *Shaftsbury's*
 Case was strongly urged, where, because of his great Interest
 in *London*, an Action of *Scandalum Magnatum* laid by him
 there, was removed. *Holt* said, that was a Case of the
 Times, and when Things were in a great Ferment; and
 I do not know that that Case was founded on Law and
 Reason; for in Case of *Scandalum Magnatum*, it was always
 ruled the *Venue* could not be changed.

Local Action
 must be laid
 where it a-
 rises.

Ante p. 408.

Ante p. 399.

Ante p. 121;
 401.

Dominus Rex versus Pigot.

Indictment for attempting forcibly to carry away a Woman of Fortune.

H E was convicted upon an Indictment for Misdemeanor in attempting forcibly to carry away one Mrs. *Hesket*, a Woman of great Fortune. And *Holt*: Sure this concerns all the People in *England* that would dispose of their Children well; and he was fined 200 Marks, and the Lady's Maid, who was privy to the Contrivance, was fined twenty Marks, and to go to all the Courts with a Paper upon her, with her Offence writ in large Characters.

Dominus Rex versus Brown.

Record of Commitment should be in the present Tense. Ante p. 495.

P ER *Holt*: Justices of Peace, upon their View of a Force, cannot meddle with the Possession; but all they can do is to remove the Force, and commit them that use it, and to make a Record thereof; and here the Record of the Commitment was *arrestaci* in the Preterperfect Tense, and not in the Present Tense, as it ought to be, and all Records of Commitment are; as *Committitur Marescallo* in this Court; and the Record was quashed, *nisi*.

Assignment of Bail-Bond. Ante p. 447.

The Way upon taking Assignment of Bail-Bond is to indorse a Promise upon it, to save the Sheriff harmless against Amerciaments, and yet the Bond continues still in the Sheriff's Custody.

Attorney may be ordered to deliver up Papers to the Owner.

Per Holt: We may order an Attorney of the Court to deliver Papers, which are not his, to the Owner.

Dominus Rex versus Ward.

On Indictment for Barretry the Defendant must have a Copy of the Articles.

H E was indicted for Barretry, in which Case the Defendant ought to have a Copy of the Articles to be insisted on against him at the Trial, before-hand, that he may have an Opportunity of preparing a Defence. And here a Notice left with the Defendant's Servant was adjudged ill; and a Trial, without due Notice, ought not to stand. And when there is a Rule to give a Copy of Articles, and that is not done, the Prosecutor ought not to be admitted at the Trial

Trial to give any Evidence, and then the Defendant is of Course acquitted.

and that not complied with, Prosecutor shall not give any Evidence.

Where Rule is made to give Copies.

Upon an usurious Contract pleaded, the Proof lies all upon the Defendant, for by his Plea he confessed the Debt. *Per Holt.*

In usurious Contract the Proof lies on Defendant.

Spurraway versus Rogers. At Nisi prius coram Holt.

CASE upon a special Promise to account; the Plaintiff gave Goods to such a Value, and a Sum of Money to the Defendant, being Master of a Ship then bound for India, who promised to bring him the Value of them home in India Goods. *Per Holt:* If *A.* take Goods from *B.* to account for them, if they come to account, tho' *A.* gives no true Account, yet if *B.* has agreed to it, it is well. And if one receives Goods of another, and expressly promise to be accountable for them, or to give an Account of them, Case will lie, if he will not account upon that Promise; but upon a general Bailment of Goods, without a particular Promise to account, there the sole Remedy is by Account. And if one covenant or promise specially upon Receipt of Goods to be accountable for them, if he will not account, Action upon the Covenant or Promise will lie; and an Action of Account lies upon the general Receipt.

Case will lie on special Promise to account, but upon general Delivery of Goods Account only will lie.

Per Holt: If *A.* buy any Thing of *B.* and gives him a Goldsmith's Bill in Payment, which Vendee accepts without Exception; if the Goldsmith were worth nothing, and *A.* not know it, it is a good Payment; *secus* if *A.* knew him to be in a failing Condition.

Bill of Exchange taken in Payment good, unless Vendee knew it was a bad one.

Dominus Rex versus Hill.

A Writ of *Excomm' capiend'* issued out against him, and the *Significavit* on which it was grounded, and which was recited in the Writ, alledged the Cause of Excommunication to have been for Non-payment of Costs assessed against him in the Spiritual Court, *in quodam negotio educationis & instructionis puerorum* without Licence, without shewing what kind of Education or Instruction it was. And

Excommunicato capiendo for Non-payment of Costs, *in quodam negotio educationis* without Licence, ill. Ante p. 192. Salk. 672.

here it was doubted, whether teaching even a Grammar School without Licence were punishable in the Spiritual Court, especially since 14 *Ca. 2. c. 4.* and other Statutes inflicting the Penalty of 40 s. a Month on such Offenders, whereby it is now made a Temporal Offence. *Vide 3 Keb. 835.*

Teaching
School with-
out Licence, a
Point never
determined.

Per Holt: If there were a Canon prohibitory of this Matter before the 25 *H. 8. c. —*, it is now confirmed by that Statute; and there is a Canon of Queen *Eliz. De ludimagistris*; and without Doubt School-masters are in a great Measure intrusted with the Instruction of Youth in Principles, and therefore it is necessary they should be of sound Doctrine, and in Order thereunto subject to the Regulation of the Ordinary. But Prohibitions have deservedly gone to stop Proceedings for teaching School without Licence, because it is a Point never yet determined.

The Species
of Education
should be set
forth.

Where Spiri-
tual Court
have given
themselves Ju-
risdiction, will
credit them,
else not.

But the main Point gone upon was, whether there were Cause good enough expressed in the Writ to give them Jurisdiction of the Defendant, in the Suit in which he was condemned. And it was urged, that the Jurisdiction they would set up in a *Causa Educationis et instructionis puerorum* was absurd, without mentioning the Species of Education and Instruction; for this might be in Dancing, Fencing, or teaching a Trade, Musick, Navigation, &c. so that tho' a Jurisdiction be granted them over School-masters, yet there is no Colour for such a general Jurisdiction: And tho' it may be objected, the Court will give Credit to them, yet that is only where they have given themselves Jurisdiction, the Court will intend they will do Justice, but it cannot be intended where they have not given themselves Jurisdiction. And so it was resolved by the Court, for a *Capias Excommunicat'* was not returnable before 5 *El. c. 23.* which directs it to be made returnable in this Court; and that the Delivery of it to the Sheriff be entered on the Roll here; and the making it returnable is what gives us Jurisdiction; and this must be in all Cases of *Excommunicato capiendo*; for there are nine Causes in which there ought to go an *Alias* and *Pluries*; and the Party, if he do not come in within six Days after Proclamation thereon, is to forfeit 10 *l.* the first Time, 20 *l.* the second, and so on. And that the Court may know whether it be for any of these nine Causes, the Cause ought to be set forth in certain; and it was the Design of the Statute that the Cause should be set out in the Writ; and the Writ did use to recite the Cause even before the Statute; and then, if the Cause ex-
pressed

pressed were insufficient, the Way was to go to Chancery, and to have a *Supersedeas* of the *Capias Excomm*; but that cannot be done now, the Writ being returnable here; and they have nothing to do to supersede a Writ returnable into another Court. *Vide N. B. 64. E. 8 Co. Trollop's Case 58.* So that now this Court are sole Judges of the Writ, and Sufficiency thereof, since the Statute. And if the Writ does not shew a good Cause, we have no Power to proceed upon it; and therefore if the Cause be incertain, as here it is, it ought to be quashed. And *Holt C. J.* said, he had acquainted the Bishops with the Matter, wish'd them to be more precise in their *Significavit*s, or else they could not have the Aid of this Court. *Et per Cur'*, the Writ was quashed and a *Supersedeas* awarded.

Before Statute, might apply for *Supersedeas* in Chancery; now it is returnable in *B. R.* if not good, it must be quashed there.

Per Holt: Every Judgment entered before the Effoin-Day of a Term, is of the precedent Term; but if entered after the Effoin commenced it is of the present Term. Ante p. 493.

The Case of the Farmers of Hampstead-water.

UPON the executing a Writ of Enquiry of Damages in Trespass, for digging a Hole in the Plaintiff's Soil, whereby his Land was over-flown, *continuando transgressionem* for nine Months; and it was insisted, that they might give Evidence of a consequential Damage after the nine Months, as well as in a Nuisance which continues for nine Months, and the Cause is removed, if the Effect continues after, Damage may be recovered for it; but *Holt* said, he was not satisfied that the Parity would hold, for the Gift of the Action in a Nuisance is the Damage; and therefore as long as there are Damages there is Ground for an Action; but Trespass is one intire Act, and the very Tort is the Gift of the Action; and therefore he said he doubted, whether an Action would lie for the Continuance of a Trespass as for that of a Nuisance. *Note*; In Writs of Enquiry the Jury set their Hands and Seals to their Verdict.

On Writ of Enquiry of Damages in Trespass, *Holt* thought could not give Evidence of consequential Damages, as in Nuisance.

Gift of the Action in Nuisance is the Damage, in Trespass 'tis one continued Act.

My Lord Peter versus Heneage. At Nisi prius coram Holt.

TROVER by Plaintiff, Administrator *cum testamento annexo* of late Lord Peter, against the Wife of the first Executor, for a Necklace of Pearl, said to have been in the Family

Heir-looms are of Things fixed to the Freehold, and not Things in Gross.

Plow. 525,
519, 520.
Cro. Ca. 346.
1 Bul. 192.

Family for many Generations, and worn as a Personal Ornament by the Lady *Peter* for the Time being, or for Default of such, by the Lady Dowager *pro tempore*. And to prove the Property, an ancient Inventory made by the Defendant's Husband, being Executor of the Lord *Peter*, now intestate, being found among the ancient Evidences of the Family, was allow'd; for the mentioning this Necklace in it, shews he did not claim it in his own Right, and none but a Mad Man will inventory more Assets than he has: And tho' if the Question were, whether my Lord *Peter* were Proprietor or not, he himself could not be Witness; yet the Executor by inventorying it has charged himself with it as Assets, and there it shall be taken as such. And here, *per Holt*, the wearing of a Pearl is a Conversion; and Goods in Gross cannot be an Heirloom, but they must be Things fixed to the Freehold, as old Benches, Tables, &c. And a Chattel in Gross cannot be devised for Life, but one may devise the Use of a Chattel in Gross for Life. If one before Administration taken out give away Goods of Intestate, and after takes out Administration, he may avoid the Gift. And the Jury cannot carry any Evidence from the Bar without Consent of both Sides, except Writings under Hand and Seal.

Dominus Rex versus Cross.

Whether
'Thief be good
Witness to
prove the re-
ceiving Goods
stolen, know-
ing them to
be so.

SHE was indicted for a Misdemeanor in receiving stolen Goods, knowing them to be stolen; and the very Thief was produced as an Evidence, who confessed the Fact, he being brought up by *Hab. Corp. ad testificand'* from the Counter. *Holt*: 'These Indictments were never thought good by me before I came upon the Bench, tho' I have been over-ruled in it once; but let us try the Fact first, and it shall be consider'd after whether the Indictment be maintainable. And he said some Judges would try a Trover for Goods before an Indictment for the Taking; but he never would do it, but rather get a Juror withdrawn, if the Matter had proceeded so far, that the Plaintiff might not be nonsuited. And the Plaintiff in this Action was bound in a Recognizance to prosecute the principal Felon in forty Pounds in Court.'

Key versus Gordon.

Indebitatus Assumpsit by an Under-Officer against his Colonel for his Pay; and here Proof was admitted of the Hand of a Person proved beyond Sea. And *per Holt*, 1st, If one receive Money to the Use of another, an *Indeb'* is a proper Remedy for it; but if in this Case there were any legal Deduction to be made by the Colonel, the Remedy had been Account; for where one receives Money, and has no Way to discharge himself of it but Payment over, an *Indeb'* will lie.

Indebitat' Assumpsit by an inferior Officer against a superior, for Pay received by him. Proof of the Hand of a Person abroad allowed. Postea Hill. 13 W. 3. Waldegrave's Case.

Trover was brought of a Silver Cup against a Gold-Smith in the *Strand*, and it appeared his Apprentice had bought it in the Shop; and *per omnes*, Sale of Goods in a Shop in the *Strand*, or elsewhere out of *London*, does not alter the Property; nor *per Holt* even in *London*, if the Felon be convicted upon the Owner's Evidence: But because he could not prove a Demand of the Master, but only of the Apprentice, he was nonsuited. The Reason why it alters Property in *London* is, because Sale in a Shop there is in Market overt.

Sale of Goods in Shop out of *London* does not alter the Property, and not there if Felon be convicted on Owner's Evidence.

Ward versus Sir Peter Evans.

PER *Holt*: If *A* owes *B*. Money, and he gives him a Gold-Smith's Note in Payment, the Debt is not discharged till *B*. receives the Money; if there be not Default in him that it was not paid, or if he does not at the Receipt of the Note give an Acquittance for the Debt to *A*. But if *B*. had an Election to receive the Money, or a Gold-Smith's Note, and he chose the Note, it may be otherwise; and more especially if he gives up his former Security that he had for the original Debt.

Note does not discharge the Debt till paid, if there be no Default.

If *A*. and *B*. be two Gold-Smiths, and *B*. gives a Note to *C*. for 100 *l*. *A*. gets Possession of it, and brings it to *B*. and takes a new Note for it, giving up his former, it is no Payment.

In Chancery it was agreed to be the constant Practice of the Court, That if there be Covenants to Purchase an Estate to such and such Uses, and Money lodged in Trustees for

Chancery will not compel a Purchase for the Benefit of a Remainder, or an Estate that Tail.

that Purpose, the Court will compel a Purchase to be made to the Uses, tho' Covenantor died before; but if the first Estate is an Entail, with Remainders over, and the Person to take it be living at the Time of the Death of him whose Money it is, there Chancery shall not compel a Purchase for the Sake of the Remainder, because Tenant in Tail may destroy it as soon as it is created; and the Court will not do a vain Thing. If a Man covenant to Purchase for him and Heirs of his Body by such a Woman, the Remainder to his own right Heirs; and he dies without Issue, and without making any Purchase; the Court will not compel the Executor to make a Purchase for the Heir, because that attach'd in himself, and is extinguish'd in him.

Legatee may bring Bill for Discovery of Assets, without making the other Legatees Parties.

If Legatee bring Bill against an Executor for Discovery of Assets, it is no Objection that he has not made the other Legatees Parties.

D E

Term. Sanct. Trin.

Anno 13 W. III. in B. R.

Time of pleading in Abatement.
Ante p. 504.

PER Cur': If one will plead in Abatement, he must do it before the Rules are out, and shall not have till Effoins of next Term for it; and formerly the Course was to give Rules for pleading generally, and after they were out, to serve Rules peremptory. If Declaration be delivered before *crast' animarum* or *mensem Pasch.* the Defendant has not Time till next Term to plead in Abatement, but only till the Rules are out; but if it be de-

deliver'd after that Time, the Defendant has till the Effoin Day of the next Term to plead in Abatement.

Per Holt: The late Statute giving Defendant Costs, does not extend to Judgment for him upon Demurrer to a Plea in Abatement.

Antep. 195.
No Costs on
Judgment in
Plea in Abate-
ment.

Writ of Error was to remove a Record *coram* J. N. *milit'* J. P. *milit'* et Jo. Bl. *milit'* *Just' nostr' de Banco*, and *Placita* return'd were *coram* G. Treby, C. J. &c. et *sociis*; and it was moved to quash the Writ for Variance. And *per Holt*, the Plaintiff's Attorney might have sued Execution notwithstanding this Writ, for it was no Authority to remove the Record; and Writ quash'd *nisi*.

Writ of Error
varying from
the Record,
does not re-
move it.

Bidolph versus Veal.

WRIT of Error from the Court of *Ely*, of a Judgment in Trespafs, the Record certified, set forth a Summons such a Day, returnable the same Day generally; and a Return the same Day of a *Summoneri*; and thereupon an Attachment, and a Return the same Day of a *Nil*, and then a *Capias* returnable the same Day; and thereupon the Defendant brought in in Custody, Declaration, Plea, Demurrer and Judgment, Writ of Enquiry executed and returned, and Judgment final, all in a Day. And this was insisted for Error, That the Summons being made returnable generally such a Day, the Defendant had that whole Day to appear; and then it was erroneous to compel his Appearance by *Capias* that Day. And that was agreed to by the Court; for tho' in Counties Palatine, and Grand Sessions of *Wales*, they split Days and Hours, and perhaps they might do the like here; yet having not done so, *viz.* made the Process returnable at such an Hour of the Day, but generally at such a Day as here, it was erroneous to award a *Capias* till the Day was over; for the *Capias* is for the Contempt in not appearing at the Return of the Summons, and in Contempt he could not be till after the Time of the Return. 2dly, It was resolved, that the bare Appearance upon the *Capias* being compulsory, did not help this Error, because it was what the Defendant could not avoid. 3dly, It was resolved the omitting to take Advantage of it then, but pleading over, cured it; for he might have demanded Judgment whether he ought to be put to answer upon the

Capias made
returnable the
same Day the
Summons was
returnable, is
Error.

Ca-

Not necessary
to have fifteen
Days to the
Return of a
Process in a
Franchise.

Capias, the Return of the *Pone* being not yet out. 4^{thly}, It was resolved it was not necessary to have fifteen Days Return of Process in a Franchise; for the Reason of them in the Court of *Westminster* is, because that Time is judged necessary for People to come from the remote Parts, to which the Process of those Courts does extend, which does not hold in Franchises. 5^{thly}, The Judgment was reversed for this Error, *viz.* that the Writ of Error is executed the same Day with the *Pone's* Return, and so might be before any *Pone* issued out; and no Appearance and Pleading can help that. *Jud. reverset*.

Fox versus Thexton.

Germes of Oak
not cut till after
twenty Years,
not tithable.
2 Inst. 643.
1 Lev. 189.
1 Sid. 300.

PER Cur': Of Germes of Oak growing not of a Root, the Tree whereof was twenty Years old when cut, there shall be Tithes paid; for Oak or other Timber cut under that Age shall pay Tithes as other Under-Wood; but if the Oak or other Timber Tree was twenty Years old when cut, it was not tithable, and for that the Germes of the Roots of such Trees cut at that Age, shall pay no Tithe. 2 Inst. 463.

Slanney versus Slanney.

Plea put in af-
ter Rules for
Pleading were
out, beginning
in Bar and
concluding in
Abatement.

DEBT upon a Bond: A Declaration was deliver'd before *menssem Pasch.* and a Plea put in after the Rules of Pleading were out, beginning with *Actio non*, and concluding in Abatement; and the Doubt was whether this were not a Discontinuance, and it was said the Books ran both ways, and agreed if it be taken in Abatement, it came too late, the Rules being out. And the Case of *Bisse* and *Harcourt* was quoted, where an Attainder in Disability of the Person was pleaded thus; and the Plaintiff replied, demanding Judgment of Damages, shewing that it was a Discontinuance, Matter of Abatement being pleaded in Bar; and said, if the Plaintiff had pleaded Matter of Fact, answering a Fact pleaded in Abatement, a Conclusion of a Prayer of Damages had been proper; but where he does not reply such a Fact, he only ought to pray that his Writ be adjudged good; for if upon Trial of Matter of Fact pleaded in Abatement, the Issue be for the Plaintiff, he shall have Judgment final: And the Case of *Medina v. Stanten* here before

before was quoted. *Holt*: Where the Court awards a *Respondeas outer*, when the Judgment ought to be final, it can do no Harm, because the Defendant cannot assign it for Error, no more than he can the Awarding an *Essoin* when it ought not to have been, being for his Advantage. At another Day he said, the Defendant begins with an *Actio non*, because the Plaintiff is outlaw'd in the C. B. and *pet. Jud. de brevi*, which is a clear Plea in Abatement. And *Mo. 30.* was quoted, where it is held, That if the Plea be for any Matter appearing in the Writ, it is proper to conclude with a *Jud. de brevi*; but if it be for any Thing out of the Writ, as Jointenancy, or the like, the Conclusion may be with a *Judicium de brevi*, or otherwise in Abatement; if one begin in Abatement, and conclude to Action, it is ill, if the Plea be not sufficient in Bar according to the Conclusion; and if Demurrer be to such Plea in that Case, Judgment shall be against the Defendant, for his Conclusion affirms the Writ good; but if the Plea commence in Bar with a good Matter, and conclude to Writ Abatement, it will be well; for the Plaintiff cannot have a good Writ, if he has not a good Cause of Action. 36 H. 6. 18. And it was said, if in the principal Case the Plaintiff had demurred or replied in Bar, and the Court were of Opinion that it was a Plea in Abatement, perhaps it would be a Discontinuance. At last the Rule was for the Defendant to conclude his Plea well, and then Judgment should go according to the Goodness of the Matter; for if this be made in Abatement, it is irregular after the Rules are out; therefore let Defendant shew Cause why he should not conclude in Bar; for these Irregularities in pleading are not to be encouraged, to inveigle the Court.

Where *Respondeas outer* is awarded when the Judgment should have been final, it is not Error.

If Plea be for Matter appearing in the Writ, *Jud. de brevi* is proper; but if for Matter *ab extra* it may be so, or otherwise in Abatement.

If begin in Abatement, and Conclusion to Action, it is ill, if Plea in Bar be not sufficient.

If Plea commence in Bar with good Matter, and conclude in Abatement to the Writ, it is well.

Per Holt: Bail was excepted against in Vacation, and no other put in, nor Bail justified till Term; and then the Principal would surrender himself in Discharge of the Bail; and that he could not do, for Bail can never surrender, nor the Party come in by way of Surrender, but at the Return of a Process, or when he is in Court by his Bail. If Sheriff return a *Cepi Corpus* upon a *Distringas*, Principal may surrender himself, but Bail excepted against is as no Bail, till changed or justified.

Bail can never Surrender, or Party come in by way of Surrender, but at Return of Process, or when he is in Court by Bail.

When it is moved to have Submission to Award made a Rule of Court, there ought always to be an Affidavit of Notice, because the Act gives the Court Power to examine the Justice of the Award. *Per Cur'.*

Notice should be of Motion to make Submission to award a Rule of Court.

Maddox versus —

Suit in Admiralty for Surgeon's Wages.

PROhibition moved for to stay a Suit in the Admiralty by a Surgeon of a Ship for his Wages; and the Suggestion was, that all was paid to the Master. *Per Cur.* Payment to the Master is not Payment to the Seamen, but the Ship itself is liable for their Wages; and they would hear Counsel.

Berty versus Dormer.

Averring Lands are deficient in Value, puts the Proof on the Pleader.

Issue directed out of Chancery was, whether Land assign'd for Payment of a Legacy were deficient in Value; and Issue was join'd upon the Deficiency, the one alledging it was deficient, and the other, that it was not. And *per Cur.* tho' averring that it was deficient, is such an Affirmative as implies a Negative; yet it is such an Affirmative as turns the Proof on those that plead it: If he had join'd the Issue that the Lands were not of Value, and the other had averr'd that they were, the Proof then had lain on the other Side: If one plead *infra Ætatem*, which is no more than that he is not of Age, and Issue is thereupon, he that pleads the *infra Ætatem* must prove it. And *per Holt*, the common Way of apprising Tithe Herbage is two Shillings in twenty. And if one devise Land to the Value of 100 *l.* a Year to another, it is *primâ facie* the best Rule of Valuation to estimate them at the Value they were at the Death of the Devisor.

Taylor versus Brudon.

On common Bail filed, if no Declaration be deliver'd in two Terms, shall be nonsuit. If good Cause of Action be not made out before a Judge, common Bail shall be order'd.

PER *Holt*: Upon common Bail filed, if one do not deliver Declaration before the End of two Terms, he shall be nonsuited. If upon Examination before a Judge, one do not make out a good Cause of Action, common Bail shall be order'd; and if upon Examination before a Judge common Bail be order'd, and the Plaintiff does not there declare that he will move the Court, or give Notice of such his Intent to the Defendant, the Judge's Rule shall be final to him. And if Plaintiff has several Attornies, a Demand of a Declaration of any of them is good.

Per Holt: The Sheriff ought not to make a Blank Warrant, for the Attorney to fill with a special Bailiff. *2dly*, If Sheriff take insufficient Bail, and Plaintiff's Attorney accepts of an Assignment of it, he thereby discharges the Sheriff from Amercements. *3dly*, The Sheriff upon Assignment does not Part with the Possession of the Bond, because if the Plaintiff be nonsuited, the Sheriff must be indemnified; but he must produce it at the Trial.

If Sheriff takes insufficient Bail, if Plaintiff's Attorney accepts Assignment of it, Sheriff is discharged from Amercements. Ante p. 516. Ante p. 447.

Per Cur': If one has several Causes of Action, each whereof is too small for special Bail, he cannot join them to enforce special Bail.

Several Causes of Action cannot be join'd to have special Bail.

Parker versus Atfield.

DEBT upon a Bond for twenty Pounds against an Executor, who pleads that the Testator was indebted in 100 l. to *J. S. ultra quod* he had not Assets. *Repl.* That the Judgment was kept up by Fraud, and the Party to whom the Judgment was, willing to take twelve Shillings for it. *Rejoind.* That it was not by Fraud, and that he had not Assets but to the Value of five Pounds; and a Demurrer, because that when an Executor pleads a Judgment generally, he thereby confesses Assets for so much, and after he cannot come and say he has Assets but to a less Value.

Salk 311. If Executor pleads a Judgment generally, he confesses Assets for so much, and cannot after say he has Assets to a less Value.

Holt: The fair Way for an Executor, is to plead the Judgment, and shew how much is due upon it; and then to say that he has not Assets but to so much; and that is the honest Way of doing it: For if a Judgment be pleaded in its full Extent of the Penalty thereof, and the Plaintiff replies that there is but so much due, or that the Party is willing to take so much, or that it is kept up by Fraud; and Issue is thereupon join'd, if it be found by the Jury that the Executor has not wherewithall to satisfy it, he shall not be charged for more, because there he is not guilty of Fraud. If there be three Judgments of twenty Pounds each, and the Executor has Assets only to the Value of twenty Pounds, and he pleads these three Judgments, which in all amount to sixty Pounds; if any one of them be ill-pleaded, or Issue be join'd, and found that any of them is kept up by Fraud, the Executor has confess'd Assets for that Judgment, that is ill-pleaded, kept up by Fraud, &c. but if the Plaintiff desire to have Judgment when Assets descend, and so admits

Executor in pleading a Judgment, should say how much is due on it.

If Executor pleads Judgment, which is ill-pleaded, or on Issue found to be kept on Foot by Fraud, he has confess'd Assets for it.

your

If on Judgments pleaded, Plaintiff prays Judgment when Assets come, he shall not be chargeable till those are paid.

Fraud is traversable.

2 Saund. 50. contra.

your Plea to be true; then the Question is, whether the Executor, having but twenty Pounds in Hand, and forty Pounds come to him, being just enough to satisfy the three Judgments pleaded, he shall not be liable to the Plaintiff's Execution, who took Judgment to execute when Assets came? And he shall not; for he has pleaded those Judgments, and the Plaintiff demands Judgment to execute when Assets came after the Judgments pleaded were satisfied; and he quoted *Pasch. 23 Ca. 2. Rot. 339. Walpole v. Prettiman*. Upon a *Sci. Fa.* upon such a Judgment to have Execution, the Defendant's Executor pleaded, that he had not Assets over and above what would satisfy the former Judgments pleaded; and held a good Plea: But if he plead any of the Judgments ill, or that it be found against him upon Issue tried, that any of them is kept up by Fraud, he shall not then have the Allowance of being free of such a Judgment till Assets descend to the Value of the other Judgments, and more so, that there is no Mischief to the Executor, let him but plead well and honestly; and to hold them to this, is the Way to make Executors honest, and to reduce Matters into Certainty. But if he had no Assets at all, his best Way had been to plead the Judgments, Specialties in their Order; but he must take Care to plead them honestly, for if any one of them be false, he is gone for all; so that if there be a Mistake in the Pleading, or Fraud, it is a Devastation, if Issue be taken upon the Fraud, and it is found; but if you are not found to have Assets for the whole Judgment, it shall not be intended you have more than you confess'd, for the Fraud is the only Thing traversable. And *Gould* quoted 1 *Jo. Veal* and *Gileston*, and *Workhouse* and *Simon*, that Issue must be join'd upon the Fraud; for if you reply a Composition made, and that yet the Judgment is continued by Fraud; still it is the Fraud that is traversable. And if one plead ten Judgments, and one of them be by Fraud, he has confess'd Assets at least to the full Value of that Judgment: And he said it had been held in the *C. B.* that a Traverse of the Composition had been well; but a Writ of Error brought, and the Judgment reversed here, for the Fraud only is traversable. *Jud' pro Quer'*.

Anonymus. In C. B.

ONE came to the Prothonotary for an Imparance generally, and having got it entred thus, *Salvis sibi omnibus exceptionibus & advantagiis tam ad jurisdictionem Cur' quam, &c.* and after would plead to the Jurisdiction of the Curt. And *per Powel*, there are two Sorts of Imparances; the one general, after which one cannot plead in Abatement at all; the other special, with a *Salvis sibi omnibus exceptionibus tam ad breve quam ad narr'*, after which one may plead in Abatement of the Writ and Count; and this Sort of Special Imparance may be granted by the Prothonotary. There is another Sort of an Imparance more special, with a *Salvis sibi omnibus exceptionibus et advantagiis quibuscunque*, which cannot be granted without Leave of the Court, and is discretionary; and after which one may plead to the Jurisdiction of the Court. And *Respond. outer* awarded, and it was order'd to be entred, for Reason, on the Roll specially, that it was obtained without Leave of Court.

Imparance.
Salvis sibi omnibus exceptionibus can only be granted by the Court, and after that may plead in Abatement to the Writ or Count, or to the Jurisdiction.
 Vide Vent.
 184.

Lancashire versus Killingworth.

THE Defendant did covenant with the Plaintiff, that upon two Days Notice within a Year, to be given at *Hudson-Bay House*, he would accept of 1000*l.* Stock in such a Company, and would pay 2000*l.* at the transferring thereof. The Declaration avers, that within the Year, *viz.* such a Day, he left Notice in Writing for K. the Defendant, to come to *Hudsons-Bay House* the fourth of *November*, which was also within the Year, to accept the Transfer; that the Plaintiff was there on the same Day ready, and did tender a Transfer of the said Stock to the Defendant, but that the Defendant did not come and accept it, or pay the 2000*l.* Upon this Declaration there was a Demurrer; and the Question is, whether upon this Declaration the Plaintiff ought to have Judgment for the Defendant's not accepting the Stock, or paying the Money? And *Holt, C. J.* who delivered the Opinion of the Court argued thus.

Salk. 623.
 Postea p. 531.
 Tender must be alledged the last convenient Time of the Day.

It does appear that the Money was to be paid upon Transfer of the Stock; and it is to be admitted, that when the Money was to be paid upon the transferring of the

Stock, or doing any other Thing, if he that is to make the Transfer, or do such other Thing, make Tender, and the other refuse, then he is as much intitled to the Money, as if the Transfer, or other Thing, had been actually done; for tho' the Words be, *that the Money shall be paid upon the Transfer*, yet if the Party does all that lies in him, he is thereupon as much intitled to the Money, as if he had done all effectually.

Postea p. 531.
If Tender is made to the Defendant, and he refuses, that Refusal should be averr'd, else it is ill on Demurrer, but help'd by Verdict.

But the Question will be, whether there be a sufficient Tender here; and we all hold that there is not, but that it is defective, and therefore the Plaintiff cannot recover; he avers that he was ready, and did at the Time and Place appointed offer to make a Transfer, but the Defendant did not accept it; and in this is the Fault of his Declaration. Suppose the Defendant had been there, and he had tender'd it to him, and the other refused, he ought to have averr'd the Tender and Refusal; and in that Case, to aver a Tender without averring a Refusal likewise, would not do. 16 *El.* 31. 17 *Ed.* 3. 11. That pleading of Tender with Omission of Refusal is not good, and so are many new Books. 1 *Sid.* 13. Action upon a Promise, that the Defendant, in Consideration that the Plaintiff would pay him a certain Sum of Money, promis'd to assign him a Term; and the Plaintiff averr'd a Tender of the Money, but that the Defendant did not assign; and after Verdict it was moved in Arrest of Judgment, that the Plaintiff did not intitle himself to an Action, for that he did not aver a Refusal, tho' he had averr'd a Tender; but it was there adjudged well after Verdict, but also held that it would be bad on Demurrer. And upon this Diversity is the Case in 2 *Saund.* 350. which I remember very well in this Court, it was an Agreement by one to build a House, and for that the other was to pay him so much Money upon building of the House; and this Averment was of a Tender to build the House, but not that the other had refused to suffer him to build it; and all the Court were of Opinion that the Tender without Averment of a Refusal was not good, but being after Verdict it was held well. 2 *Vent.* 109. *Buckley v. Milierd.*

If Time and Place be appointed for doing a Thing, and the Party to whom it is to be done, is not present, Tender at the Place the last convenient Time must be alledged.

Then there is another way of pleading a Tender, if Time and Place be appointed for the doing of the Act. If the Party that is to do it come, and he to whom it is to be done do not come, there he ought in his Declaration to alledge that he was at the Time and Place, and tender'd, but no body came to receive. *Yel.* 38. And if the Party, to whom

whom the Thing is to be done, be absent, there is this further considerable in averring a Tender, that is, the Time of Day to make the Tender; if there be Time and Place appointed, the Party cannot come at any Time of the Day to make a Tender; but in such Case the Law hath appointed the last Time of the Day, on which the Thing can be conveniently done, for the Tender to be made; for it cannot be in the Morning, nor at any Time of the Day, but the last Time on which it may conveniently be done, and the Party must stay till then. 5 Co. 114. *Wade's Case*. 2 Cr. 423. Exception was taken to a Pleader of a Tender on a Day certain, because it was not said at what Time of the Day it was made, for he might have come and made Tender at a Time not fit or appointed by Law, in the same Day.

Holt: If he had averred a Refusal to accept, such Refusal would be good Evidence of a Tender to his Person, and that would have been good at any Time of the Day; and Averring of such Tender and Refusal on the Plaintiff's Side would have been well, without telling on what Time of the Day the Tender had been; because the Averring of a Refusal implies the Defendant's being present, who ought to accept it; but if the Party were not present, it ought to be shewed that he did not come, and that you were there, and made Tender on the Time of the Day on which the Law appoints it to be done; and that is the last Time of the Day on which it may be done conveniently.

Postea 531.
If Refusal be averred, it is good Evidence of a Tender to the Person, which would be good at any Time of the Day.

It was heretofore questioned, whether it should not be alledged, that neither the Party himself, or any Body for him, was at the Place to receive; because if any Body else had been there for him, it had been as well as if he himself had been there; and therefore antient Precedents are, that neither he nor any Body for him was there. But a Tender being pleaded, and that he was not there ready to receive it, was held good, without saying, that no Body else was there for him. 3 Cr. 734. 2 Cr. 13. *Tels*. 38. For if any Body had been there on his Behalf, that ought to come of his Side, and it shall not be intended if they do not shew it. And what is the Reason of this? This is it: When a Man has covenanted and agreed to do a Thing, in Excuse of himself, for not doing thereof according to Agreement, he ought to shew that he has done his utmost Endeavour to perform it, and shew how it came to pass that he did not, or could not do it. And here was an Agreement by the Plaintiff to transfer his Stock, and hereupon the Money was to be paid; the Plaintiff indeed says he tendered the Transfer,

Tender pleaded, and that was not there to receive it, good, without saying, nor no one else for him.

Where Person
agrees to do a
Thing, he
must shew he
has done all
in his Power
to perform it.

fer, and so shews he did whatever he could do towards the Performance of his Agreement; but that is not enough, for he ought likewise to shew how it came to pass that it was not performed; as that the Defendant was there and refused to accept, or was not there at all, or on the last convenient Time of the Day, which the Law appoints for doing the Matter. And all this the Plaintiff ought to shew to intitle himself to this Action.

Upon this Reason of Law is the Case in 8 Co. 92. One makes a Feoffment, upon Condition that the Feoffee should reinfcoff the Feoffor; or one binds himself in a Bond to infeoff Obligee by such a Day, and before the Day the Feoffee, or Obligor, is disseised by him that was to be infeoff'd, and then the Bond is put in Suit, it is not a good Plea to say that you were always ready to infeoff him, but that he himself before the Day ousted you; but you must proceed farther, and say, that he kept you out of the Possession till after the Day, with Force; for tho' he had interrupted you, perhaps you might have come upon the Land after and performed the Agreement, or make a Tender, which if he refused would have been tantamount; for you ought not only to shew a Disturbance by him, but also such Continuance of that Disturbance as made it impossible for you to perform on your Side; and in that Case he ought to shew, that he came to endeavour to make a Feoffment, but could not do it by Reason of the Force he met with from the Plaintiff; and that had been a good Excuse; for if he, to whom a Thing is to be done, hinder the other that is to do it ever so much, yet the other must use his utmost Endeavour on his Side to perform; and shew that he has done it, or else he forfeits his Bond, or breaks his Agreement. 3 Cr. 694. is a very remarkable Case; the Condition of a Bond was, that before such a Day the Obligor would procure such a Woman to marry the Obligee, the Obligee goes to her, and tells her, how barbarously he would use her if she married him, and called her *Whore*, and threatened to tie her to a Post, and told her such Things, that no Woman in her Senses would marry such a Man; after the Day, Debt was brought upon the Bond, and this Matter specially pleaded in Bar; and adjudged to be no good Plea, but that notwithstanding the Menaces, the Obligor ought to have shew'd that he had done his utmost Endeavour to procure her to marry him, but that she by Reason of the Menaces refused, and so he was hindered by the Plaintiff.

Hob. 177. An Award to enter into a Bond to another, it is not enough for the Party to bring a Bond written, and to say *I will seal and deliver you this Bond*; but he must bring the Writing, with a Seal clapped upon it, and say, *I deliver you this as my Act and Deed*; and if he omits the doing of any one Thing that is essentially necessary to the executing a Deed, he has not performed the Award.

There is one Thing of what I have said may be liable to Exception, especially in a Case of transferring a Company's Stock, which is mentioned in the Case of *Shales and Seignoret*; this Transfer was to have been made in the Book of the *Hudson-bay* Company, and they have set Hours on which their Books are open; and to say that he was there to make transfer, and tender'd it at a Time which is the last convenient Time of the Day, might be in vain; because by the Usage of the Company, the Books are not then open, and therefore no Transfer could be; and a Tender, when no Transfer could be, would be void.

Answe. If the Agreement leaves it indefinite at such a Day, the Law knows no other Time but the last convenient Time of that Day; but if a Usage be averred, that the Time for transferring is between such an Hour and such an Hour, there it ought to be averred, that he came within the ultimate convenient Time by the Usage, and that will be well; as if the Usage be, that the Books are open till six a Clock only; the proper Time to come will be about five, and to stay till six. And *Jud' pro Def', per totam Cur'*.

When Time is left indefinite, it is the last convenient Time of the Day; but if by Usage of a Company, the Time of Transfer is at a set Time, that must be averred.

Furlong versus Thornigold.

DEBT upon a Bond for the Performance of an Award; *mul Award* pleaded; Plaintiff sets forth Part of the Award, but not all, and concludes with a *Profert*; Defendant craves Oyer, and the Award being set forth at large, demurs generally, for the Variance between the Award replied, and that set forth on the Oyer; and *Smith v. Teoman*, 1 *Saund.* 319. was quoted, where the Plaintiff in such Case ought not only to set forth the Award, but also to assign a Breach. But it was objected, that it is enough to shew so much of the Award, as to give himself Cause of Action, and to shew the Award good, that is mutual; and if there be any Thing more in it, it ought to come of the Defendant's Side; as in case of an Action upon Act of Parliament. *Vide 1 Leo.* 72. In Debt upon an Award, nothing was set forth but the

Award. If only Part of an Award be set forth, and concludes with a *Profert*, if Defendant craves Oyer and demurs, it is ill for the Variance.

Submission to the Award of *J. S.* and that he awarded the Defendant to pay the Plaintiff 10*l.* and held the Action did lie, and that the Plaintiff is bound to shew no more than does for him, and the rest ought to come of the Defendant's Side. *Vide Lewis v. Scholastica* in *Plow.* that one need say no more than is for his Purpose. *Palmer* 511. That in order of good Pleading, that when the Defendant pleads *Nullum fecerunt arbitrium*, and the Plaintiff shews an Award and Breach, the Defendant ought to rejoin *Nullum tale fecerunt arbitrium*.

Award may
be good in
Part, and void
in Part.

If a void Part
of an Award
be omitted to
be set forth,
it is well.

Holt: You set out too little or too much; for you do not set out the whole Award, but you say *Profert*, as if you had set it out; but the Question will be, whether it will not be well on a general Demurrer. 2 *R.* 3. 13. The Issue is *Non fecerunt hoc arbitrium*; but suppose Part of the Award be well, and another Part void, and so bad that it avoids even the whole Award, and the Plaintiff sets out only the good Part, & *nullum tale fecerunt arbitrium* be pleaded, and then the whole Award is set out. 18 *Ed.* 4. 32. *Bro. Arbit.* 39, 41. But in those Days they held an Award void in Part to be so in all; as Award that there should be mutual Releases for the Purpose, and that one of the Parties should get a third Person to be Security for the Payment of 10*l.* to the other, such Award would have been held void *in toto* in those Days; and so was the Law held all along till King *James* 1.'s Time, when as appears in *Hob.* and *Hutt.* it was held an Award might be good in Part, and void in Part; but here it was said, that the Plaintiff ought to set forth all the Things awarded to be done by him, tho' perhaps he need not set out every Thing to be done of the other Side; and the Omission hereof in the Declaration, and setting it out in the other Part, is a substantial Variance. But if a void Part of the Award be omitted, so it be such a void Part, as does not avoid the whole Award, that may be well enough; for where an Award contains several Matters to be done on the Plaintiff's Side, all which are well awarded, and to be performed by the Plaintiff, and he only sets out enough to intitle himself to an Action, and they come and plead no Award, and upon Oyer of the Award it appears the Plaintiff was to do more than he set forth, and that those Things were well awarded, that is, that the Award was legal as to them; the Question is, whether he ought not to shew all those Things that he was to perform, or if the Omitting any of them be not a substantial Variance? It was said, that in Debt upon an Award he need only set out enough

nough to intitle himself to Action; but that he ought to shew so much of the Award as was necessary to make it good. And *Holt* seemed to approve of the Case in 1 *Leo.* 72. *vid. Style* 98. 1 *Sid.* 161. that Debt lies upon an Award, without setting it all out. But here the Variance was held material; and *Jud' pro Def'.*

Wilbraham versus Lownds.

Trespas *quare Clausum fregit* in *Cheshire*; and it was pleaded, that this Court ought not to take Conufance of it, for that the Defendant, at the Time of the supposed Trespass and Bill exhibited, was an Inhabitant of the County Palatine where the Trespass was made; & *petunt Jud'*, if this Court will take Conufance; to which there was a Demurrer. In Maintenance whereof it was said, that the Declaration was against him *in Custodia Marefcalli*; that his being in Custody of the Marshal was not traversable, no more than being the King's Creditor in a *Quo minus*. Besides, the Defendant's being an Inhabitant of the County Palatine, does not hinder his being an Inhabitant out of it; for a Man may be an Inhabitant in several Places at once; and in all Appeals, and Indictments of Murder, the Party is alledged to be an Inhabitant in the Place where the Murder is committed.

Trespass in
B. R. for
Trespass com-
mitted on
Lands in
County Pala-
tine of *Ches-*
ter.

Holt: As to your Case of *Quo minus*, it is traversable, if the Party comes in due Time to do it. And if one be a Prisoner here, against whom one has a Cause of Action arising within the County Palatine, so that his being a Prisoner here hinders that Person from proceeding against him below; sure the Cause's arising within the County Palatine shall not hinder us from having Conufance of it here; but that is where he is first in Custody of Marshal for Cause, and another, or the same Party, has another Cause of Action arising against him in the County Palatine; and if the Truth were so, that the Defendant was in Custody of the Marshal before, for a Cause arising within our Jurisdiction, the Defendant instead of demurring ought to shew it in Support of our Jurisdiction. But any Plea of Privilege is good to a Declaration against one *in Custodia Marefcalli*, if he was brought wrongfully there. As if an Attorney of the Common Pleas be arrested upon a *Latitat*, and is in Custody of the Marshal for Want of Bail, or suppose he puts in Bail, it shall not hinder him of pleading his Privilege; because he cannot

A Man's be-
ing the King's
Creditor in a
Quo minus is
traversable.

If a Person is
in Custody of
Marshal for
Cause, may
proceed a-
gainst him
for a Cause a-
rising in Coun-
ty Palatine.

Any Plea of
Privilege is
good to a De-
claration a-
gainst one *in*
Custod' Mar',
if he be there
wrongfully.

Ante p. 113. cannot plead till he put in Bail, if he be not in actual Custody; and if we give Judgment, it must be for the Defendant.

Lancaster versus Lovelace.

In Inferior
Courts no Di-
minution can
be alledged.

ERROR of a Judgment in the Court of *Canterbury*. 1st, it was excepted, that in making Title to a Court they laid to be a Court by Prescription *secundum consuetudinem Curie præd'*; and that was absurd to lay a Custom in a Court to hold a Court, but it should be laid in the City, &c. *Sed non allocatur*, upon the Authority of *Annesie's Case*, where the same Exception was over-ruled; but besides, this was laid to be a Court Time out of Mind, according to the Custom of the said Court, and confirm'd by Charter. 2^d Exception, it does not appear that the Jurisdiction of the Court was co-extensive with the City, and they alledge the Cause of Action only to have arisen within the City; but it was said, that the Defendant coming in and answering had waved that Advantage. 3^d, That the *Venire* was, *Venire facias*, &c. *duodecim*, &c. which ought to be set forth at large in case of an Inferior Court, where no Diminution may be alledged; and the Reason why such Entries are allowed in the Superior Courts is, because one may alledge Diminution, and thereupon have the Matter certified at large; *vide* 1 *Cr.* 164. 1 *Roll. Ab.* 800. *Style* 20, 164, 195. 1 *Roll. Ab.* 801. *pl.* 20. But against this was quoted *Raym.* 20. *Raym.* 217, 218. 2 *Keb.* 383. where this Exception was over-ruled. *Holt*: They must set forth the Proceedings as they are by the Award of the Court, for no Diminution lies to them; and all Advantages must be taken against the Matter, as it appears on the Record; and we must take the *Venire facias* to have been awarded as it is entered on the Roll; and he said, there was never a Precedent of Entries in an Inferior Court in *Rastall*.

Holt, at another Day: The Want of *quorum quilibet*, &c. may be well, because it is *duodecim de Inhabitantibus* of the City; but the Want of filing the *Qui nec* seems to be Substance, and therefore fatal. *Qui nec* ought not to be in the King's Case, because none can be of Kin to the King; but there it must only be *Qui non attingat* the Subject *aliqua affinitate*. And *per Clerk*, on the Civil Side they always file the Writ, but *secus* on the Crown Side. And *per Cur'*, before Justices of Gaol-delivery, there is no other Warrant for a Jury but the Award on the Roll.

Per Holt: If one would plead a Plea amounting to the Colour. General Issue, he ought to give the Defendant Colour, either *Ante p. 377*: express or implied.

Hall versus Bond.

DEBT by Administrator *cui administratio debito modo commissâ fuit*; Defendant pleads over. *Per Cur*: This had been bad if demurred unto, but is now help'd by your pleading over; for you thereby admit he has a Right of Suit, and is Administrator. *Suit by Administrator cui administratio debito modo commissâ, ill on Demurrer, but good by pleading over.*

May versus King.

INdeb' *Assumpsit* for 40*l.* for Work done, and *Quantum Indebitatus Assumpsit* for the same. The Defendant pleads, that there being mutual Dealings between the Plaintiff and him, they came to an Account; and that it did appear on the Account the Defendant was in Arrear to the Plaintiff but 5*l.* which he promised to pay him; in Consideration whereof the Plaintiff did discharge him of the said Debt and Claim; to this Plea there was a Demurrer. And it was now argued for the Defendant, that a Promise, before it is broke, may be discharged by another Promise; and a Case in *Trin.* 27 *Car.* 2. was relied upon, and it was this: A Man sold a Horse to another for 20*l.* and there is other Dealing between them, and upon reckoning together it was agreed between them, that he that sold the Horse owed to the other 5*s.* and no more; and in Debt brought for the Horse this special Matter was pleaded, and held a good Bar. *Vide 1 Mod.* 205, 206. 2 *Mod.* 44. And in many Cases else one may confess and avoid the Cause of Action, or else plead generally, and give it in Evidence; as in Maintenance one may confess and avoid it, by saying he was a Counsel at Law, and did it for his Fee; 21 *Ed.* 3. 17. and yet this would be good in Evidence upon a Not guilty. 3 *Cro.* 900. To an Action for a malicious Prosecution, probable Cause of Suspicion is a good Plea, tho' it may be given in Evidence upon Not guilty pleaded. 2 *Cr.* 130. *Br. Maintenance* 16. 10 *Co.* 88. 9 *H.* 6. 64. That one may plead the Maintenance was for his Fee, or generally Not guilty, and give it in Evidence; and the Diversity was said to be where the Fact is complicated,

cated, and may be apt to inveigle the Jury; there, that the Court may be the better able to direct the Jury, the special Matter may be pleaded; and here it was said, that the Defendant gave Colour to the Plaintiff; for we agree there was a Cause of Action once, but that it is now gone by the Account; and formerly the special Matter used to be pleaded in Trover, and held well; as that the Goods were bought in Market overt, whereby the Property was allowed once to have been in the Plaintiff.

Promise before broke may be discharged by Parol; but after, cannot be discharged without Deed, or Satisfaction.

Deeds must be pleaded according to their Operation in Law.

Bond for simple Contract is not Payment, but extinguishes it. Ante 86, 406.

Holt: It is true, a Promise, before it is broke, may be discharged by a parol Agreement, but after it is broke it cannot be discharged, without Deed, by any new Agreement, without Satisfaction; as by Accord with Satisfaction, or by Release in Writing; and it is likewise true, that Sale in Market overt is a good Plea in Trover. But if one bind himself in a Bond for the Payment of 20*l.* to *A.* by a Day certain; and *A.* buys a Horse of the Obligor of the Value of 20*l.* before the Day, and then they two account together, and 20*l.* is set and agreed for the Horse; in Action brought upon the Bond he cannot plead the General Issue; yet he may plead *Solvit ad diem*; and must not plead it by Way of Account, but it must be pleaded according to the Operation it has in Law, and that is to be a Payment; and so here. As if Tenant for Life grant his Estate to him in Reversion, it is a Surrender, and must be pleaded as such, and not by Way of Grant; so here to plead this by Way of Account, when the Operation in Law is Payment, will be ill. And *per ipsum*, If there be two Dealers, and without coming to an Account they agree to be clear against one another, it would not be well, without coming to an Account; and the Case quoted out of the *Mod.* was the first of this Kind, and by my Consent shall be the last. And to plead it as an Account is but argumentative of *Payment*, which is direct, and therefore not to be allowed; nor need this be shewn for Cause of the Demurrer. And this is nothing like Debt upon a simple Contract, to which it is a good Plea, that the Defendant has given his Bond for that Debt, and that the Plaintiff did accept it in Satisfaction; or where upon a General Issue that Matter may be given in Evidence; for the Bond is no Payment of the original Debt, but a Thing of a higher Nature, which extinguishes it. *Et per Cur', Jud' pro Quer'.*

Ball versus Smith.

DEBT upon a Bond, and no such Person as the Plaintiff in Being pleaded; *Respond' ouster* awarded; for after Attorney made and entered on Record, the Defendant cannot plead such a Plea.

After Attorney made and entered on Record, cannot plead there was no such Person as the Plaintiff.

Baber versus Palmer.

DEBT upon a Bond, and the Statute of Composition of two Thirds in Number and Value pleaded; and to that a Demurrer, and Day given over, since which Day the Defendant pleaded, that since the last Continuance the Plaintiff did by his Deed grant and agree to and with the Defendant, to accept a Bond for the Building of a House in Satisfaction of the first Bond; and now it was held not to be a good Plea, for it amounts to no more than a Covenant, and not to a Release. It was also held, that by pleading that Plea, *Puis darrein continuance*, was a Relinquishing of the former Plea, to which the Demurrer was, contrary to *Hob. 81.* which was quoted. And *Holt* said, that a Bond may be a Satisfaction of the Condition of another Bond, before it is forfeited; *secus* after. And here it was debated, whether, if Part of the Money had been paid, *Puis darrein continuance*, and an Acquittance given for it, whether it ought to be pleaded in Bar or in Abatement; and *Style 112.* where it was pleaded in Abatement, was quoted; and *Allen 65.* had without Acquittance; and there held, if one has Acquittance in Hand, he may plead in Bar or Abatement, at Election; to which *Holt* said, that as he remembered, but that he spoke upon an old Memory, that when such Receipt of Part was pleaded in Bar, it was no Plea, that is, no Plea to bar the whole Debt or Action, but only for so much as was received; as suppose Debt be for 40*l.* whereof 20*l.* is paid before the Action brought, and that Payment and Acquittance pleaded in Bar, it is good for so much only, in Bar. And the Law will be the same where the Payment is after the Action brought; for why shall it not be a Bar for so much as well when it is paid after the Action brought as before; for its being paid after the Action brought does not falsify the Writ more than its being paid before; for in both Cases it e-

qually

Salk. 178.

Covenant to take Bond in Discharge of a Bond, not a good Plea to Debt on a Bond, for it is not a Release.

Pleading the Plea *Puis darrein continuance* is a Relinquishing the former Plea.

Bond may be Satisfaction of the Condition of another Bond before forfeit, not after.

If Part of the Money be paid *Puis darrein continuance* and Acquittance, whether to be pleaded in Bar or Abatement.

Postea 541. *Holt* inclined good Plea in Bar for Part.

qually falsifies the Writ; and in both Cases you may demand Judgment *si actio* of the 20*l.* which you paid, and for which you have an Acquittance. And the Matter of the Plea remains *ante & pendente placito*, for Acquittance and Payment is a good Plea in Bar at any Time, but it shall be pleaded *quoad* so much only, and so it would have been if the Payment had been of Part before the Action brought. But *Cr.* 342. *Mo.* 598. *Co. Ent.* 159. Debt upon Bond for 40*l.* and pleaded in Abatement, that pending the Action the Plaintiff had attached the Defendant's Money in *London*, and recovered it there; and the Court held in that Case, that such Receipt of Part ought to be pleaded in Bar *pro tanto*; but if it were a Discharge by the Act of the Party, it ought to be only in Abatement, that is when the Payment is after the Action brought; and that there is no Diversity between this and a real Action; for if an Assise be brought for twenty Acres, and after an Entry is made into one of them, it shall abate the Writ; but *Holt* said, that was where the Entry was by one without the Consent of the other; but have you ever known it pleaded in Abatement where both Parties did Consent; as when the Entry was by Virtue of a Conveyance made by the Tenant to the Demandant. But *per Cur'* it was adjudged for the Plaintiff here upon the first Point, and no Resolution on the other Point, *viz.* whether it should be in Bar or Abatement.

Gaming.
Ante p. 258.

Per Holt: If at one Sitting one loses above 50*l.* to one, and so to another, he must pay it, for they are several Contracts; so if one of them plays with false Dice, and the other with fair ones, he that plays with the fair Dice shall recover his Winnings.

Birch versus Bellamy.

Term cannot now be assigned without Deed, but need not be said so in Pleading, but to come in Evidence.

P*ER Cur'*: Tenant for Years now cannot assign over his Term without Writing; but the Assignment may be pleaded without saying it was by Deed. If a Thing might have been done at Common Law without Writing, and an Act of Parliament comes and says it shall not be good without Writing, that shall not alter the Manner of Pleading, but the Pleading shall continue as before; and its being in Writing shall come in Evidence; but if a Thing be made good originally by Act of Parliament, there you must plead all the Circumstances of the Act; as upon the Statute of 32 *H.* 8. of Wills, you

you must set out that the Will was in Writing, and so plead it.

All the Circumstances of Wills must be pleaded.

Redmond versus Joseph.

DEBT upon a Judgment; Defendant pleads in Bar that a *Capias ad Satisfaciend'* was taken out against him at such a Time, by Virtue whereof he was taken in Execution; and that the said *Capias* was return'd on Record, but did not aver that the Execution continued, or that the Debt was paid; and on Demurrer, *Holt*: If he was once in Execution, it must be intended he continues so, if he has not paid the Money; for if he has escap'd, you should reply that of your Side that are Plaintiffs, for this is a Plea in Bar, and good to common Intent. And he quoted two Cases, where he had known Escape replied to such a Plea; and a taking in Execution is a Bar to all other Remedies while it lasts, and we cannot intend an Escape. And here if he had aver'd the Continuance in Execution, if they cannot traverse it of the Plaintiff's Side, what does his Averment of it avail them? and if he be not in Execution, but escaped, they may reply it. And the Writ issued out is not of Record till it be return'd, tho' the Execution be good before any Return.

On Debt on Judgment, Plea that was taken in Execution good, without averring the Execution continued.

Brown versus Gullock.

IN Debt upon a Bond for 400 Godies, *East-India* Money; the Plaintiff declared for 180 *l.* and it was objected, that they ought to make their Declaration according to their Lien. *Holt*: They must demand *English* Money, and not Foreign Money, and they are to value it according to the Value it bears here in *England*; but if a Man will bring an Action for Foreign Money, it must be Detinue.

In Debt on a Bond for foreign Money, must declare of so much English Value. Ante p. 81.

Pierce versus Packston.

DEBT upon Bond; Defendant pleads Payment of Part *puis darrein Continuance*, which the Plaintiff accepted, in Bar. *Holt*: The Defendant could not have pleaded it in Abatement, but must have done it in Bar; and when ever a Thing, which in its Nature is a Bar, happens, and is pleaded

On Debt on a Bond, Receipt of Part of the Money *puis darrein Continuance* pleaded in Bar, good.

Alter on Contract, for might be given in Evidence.

ed *puis darrein Continuance*, it admits of no Answer; and this he said was not like the Case of Foreign Attachment, tho' that has been held to be Matter of Payment, and therefore a good Plea in Bar; nor like the Case of the Demandant's Entry into Part of the Land, *puis darrein Continuance*, for that is the Party's own Act only. And he quoted the Case of 3 H. 7. 3. b. 5 H. 7. 41. a. The first was Debt upon Contract, and Receipt of Part *puis darrein Continuance* was pleaded; and there it was held to be no good Plea, because it might be given in Evidence, but if it had been upon Debt upon a Specialty, it must have been pleaded in Bar. *Vide 17 Ed. 4. — 22 Ed. 41.*

Dominus Rex versus Fuller.

Indictment for procuring an Attorney to be press'd to Sea.

BEING convicted upon an Indictment for procuring an Attorney of the Court, who married his Sister, to be press'd to Sea, he was fin'd 100 Marks.

King versus Yates.

Outlawry reversed, not appearing where the Court was held.

AN Outlawry for High Treason was reversed, upon the Exception, that it did not appear where the first Court was held.

Fitter versus Veal.

Salk. 11. After Recovery of Damages in Assault, Battery, &c. no Action will lie for consequential Damages.

IT was a Special Action of Trespass, in which the Plaintiff declared of a Battery and Wounding of him at such a Time, for which he brought Trespass, and recovered Damages for the Beating and Wounding; but that since that Time, by reason of the Wounding, he was fain to be trepann'd, and have a Bone taken out of his Skull, so that he thereby became maim'd; and the former Recovery being pleaded in Bar, the Question was if this Action did now lie.

Sir B. Shower urged that it did, for that nothing was recovered for the Maim before, for it was not known or in Being at the Time of the former Recovery; and the Question is, whether an Action will not lie for a Consequential Damage that happens to one from the Wrong of another, subsequently to a Recovery for the original Wrong; and sure it is hard

hard it should not; for the Wrong done by the Stranger, and the Damages arising thereby to me, are the Ground of the Action. And if a Man does in Time subsequent suffer by the wrongful Act of a Stranger, he ought to have Remedy for it; and we are here Sufferers by this Battery in a new and higher Degree, and this since the Recovery; therefore we have received no Satisfaction for it, because the Jury could not have it under their Consideration, being not then discovered. If this one Act had been to the Damage of two, both of them should recover Reparation with respect to their several Damages, tho' it be but one intire Act. *Ergo*, If one Act of mine will prejudice another twice, or in several Degrees, there ought to be several Reparations, more especially when one of the Species or Degrees of the Damage is not known till after a Recovery for the other; and after Recovery for this Trespass, if the Plaintiff had died within the Year, the Defendant would be punishable by Indictment at Suit of the King, or on Appeal at Suit of his Wife or Heir. And he said, if *A.* enter'd into my Ground, and breaks down my Wall which keeps out the Sea; and I bring Trespass, and recover Damages, and I rebuild my Wall, but by Reason of the Newness thereof it is broke down by a new Storm, which the old Wall would have resisted; shall I not recover new Damages for that Loss?

Cur': This is a new Case, and none to be found that we know like it; for every Man that recovers Damages, it is supposed he has received according to the Damage that he has received. If the Plaintiff's Surgeon had come at the last Trial, and shewed that the Plaintiff was not cured, the Jury would have considered that Matter; and then was his Time to consider of the Heinousness of the Battery, and to give Evidence of it. And in this Case the Gift of the Action is the Injury, or first Battery; and the Wounding and Maiming is but Aggravation of that Injury: But in some Cases the Damage is the Ground of the Action, as where a Master brings Action for beating his Servant, whereby he loses his Service. And it shall be intended here that the Jury gave intire Satisfaction for the Battery. And as to the Case put of the Sea-Bank, the Plaintiff shall recover Damages for the Overflowing of his Lands, and to rebuild his Wall; and the Danger of the new Wall, if there be any Thing in that too, may be considered; but this must be all at once.

And tho' there be nothing of Maim in the first Declaration, yet a Recovery in Trespass and Battery is a good Bar

When Damages are recovered, it is according to the Damage received, and entire Satisfaction.

Recovery in Trespass and Battery is a good Bar in Maim.

A Man may
be indicted for
a Trespass,
and after in-
dicted for
Murder.

If one recover
Damage for
Words, no
Action will
lie for that by
reason of them
she lost a Hus-
band.

Battery is a
transitory Act,
Nuisance a
continued one.

in Maim. 4 Co. 43. a. In criminal Matters one may be twice punished for the same Offence; for if Indictment be for Assault and Battery, and the Party is convicted and fin'd, yet the Plaintiff may have Trespass, and recover Damages against him; and if after, and within the Year the Party dies, the other may be hang'd for the Murder. But *per Holt*, If a Man be dangerously ill of a Battery, and is indicted for it, the Indictment for the Battery ought not to be tried till after the Year. And if *A.* wound *B.* and he thereof die within the Year, thro' the Unskilfulness of Surgeons, yet it is Felony in *A.* And if *A.* brings an Action for Words actionable in themselves, and recover Damages, and after, by Reason of the Words, she lose a Husband, yet no Action will lie after for the special Damage: And so if the Words be actionable for special Damage, which Party has suffer'd by Reason of them, and for that Damages are recover'd, and after the Party has another special Damage. *Per Holt*. And they all held that this is not like the Case put, where a Tort is done to two by one Act, for there a Recovery by one is not for the Tort done to the other; and upon Declaration for Assault, Battery and Wounding, one may give Maim in Evidence, and recover Damages for it; and therefore a Recovery in such an Action is a good Bar to an Action for Maim. And this is not like the Case of a Nuisance in erecting a Pent-house, whereby the Rain falls upon my House or Garden; or stopping my Lights, wherein I shall recover Damages for every new Hurt *in infinitum*; for 1st, the Battery is a transitory Act, and the Nuisance is a continued one as long as it lasts; therefore Damages cannot be recovered for it at once. 2^{dly}, Every new Rain that falls, or every Light that is stopt, is a new Nuisance; but every new Ill Consequence of the Battery is not any new Wrong of the Defendant. *Et per totam Cur', Jud' pro Defend'*.

Dominus Rex versus Young.

Before Out-
lawry for
Murder can
be reversed, a
Scire Facias
must go to all
the Lords, or
Attorney Ge-
neral must on
Record confess
are no Lands.

HE was outlaw'd for Murder, and brought a Writ of Error; and being brought to the Bar was ask'd what he could say why Execution should not be awarded against him; and presented a Writ of Error upon his Knees, and assign'd for Error, that it did not appear that the County Courts, at which the Proclamations were, were holden for that County.

Holt: You must bring a *Sci. Fa.* against all the Lords mediate and immediate, or Mr. Attorney must come into Court and confess on Record that you have no Lands or Tenements; tho' he said he had known Outlawries revers'd without such *Sci. Fa.* but that was a dangerous Course, for the Lords mediate and immediate, who, tho' when they are summon'd by such *Sci. Fa.* could not plead *in nullo est erratum*, nor bar the Reversal of the Judgment, yet may plead Releases or Fines levied to them by the outlaw'd Person after the Outlawry, in Bar of Restitution; but since they cannot maintain the Judgment, such *Sci. Fa.* seems rather of Caution than of Necessity. And after Reversal of the Outlawry in this Case, upon the Attorney General's Confession of no Lands, the Defendant was committed to Newgate, to undergo his Trial the next Sessions.

Postea Mich.
13 W. 3.
Dominus Rex
v. Young.

1 Jo. 421.

Wilbraham versus Doley.

IN Error to reverse an Outlawry for Error in Law, the Question was, whether the Plaintiff must give Bail to the Original Action, as he must do when it is to be reversed for Want of Proclamations, upon the Statute of 31 *El. c. 3.* And *Gould* cited a Case out of *Littleton's Reports*, where he was held to bail upon an Error in Law, the original Cause of Action being such as required special Bail. But *per Holt*, They ought not to be holden to Bail upon any Error in Law, for the Statute of *El.* mentions only Want of Proclamations; and your Case out of *Littleton's Reports* is bunglingly Reported. And they all said, if it did appear to them that there was a Want of Proclamation in the Outlawry, and an Error in Law besides, tho' the Party assign'd the Error in Law only, yet they would reverse it for the Want of Proclamation, and so hold him to Bail; but if there were not Want of Proclamation, but meerly an Error in Law, there need be no Bail; for as the Statute made a new Error for the Advantage of the outlaw'd Person, so it thought to recompense that with another to the Creditor, that in that Case he should have good Bail to his Action; but however they directed the Party outlaw'd to put in Bail to answer the Condemnation, or render his Body. *Note*; *Per Holt*: Special Bail to reverse an Outlawry must be simply to answer the Condemnation; but other special Bail

In Error to reverse Outlawry for Error in Law, Bail need not be given to the original Action, as it must be for Want of Proclamations.

Special Bail to reverse Outlawry, is to answer Condemnation; or Body to Prison.

ther special Bail is to answer Condemnation, or render Body to Prison.

is to answer Condemnation, or render his Body; and it was agreed, if the Party were taken up upon the *Cap' Utlagat'*, he must give Bail to reverse the Outlawry; and they further said, the Sheriff was fineable for leaving such Errors in Outlawries.

Justices of
Peace of the
County may do
what Justices
of the Division
are appointed
to do by Act

Per Holt: Where an Act of Parliament says Justices of Peace of such a Division shall do so and so, it is only directory *quoad* the Division; and any of the Justices of the County may do it.

Vill is a Con-
stabulary.

Per Holt: A Vill and a Village are the same, and a Hamlet is a Division of a Vill. 18 *Ed.* 1. The whole Vill is a Constabulary, and a Hamlet is commonly a Tithing.

Prat versus Rutleis.

Whether a se-
cond Deliver-
ance be a *Super-
fedeas* of
Writ of En-
quiry. 2.

Distress for Rent, Replevin, and Avowry, and the Plaintiff in Replevin nonsuited, a *Returno Hab.* awarded, and a Writ of Enquiry of Damages issued out, and before Execution a second Deliverance; and the Doubt was, whether this second Deliverance be a *Superfedeas* of the Writ of Enquiry?

And that it was, was urged, that the Writ of Enquiry is grounded upon the *Returno habendo*, and the second Deliverance is a *Superfedeas* of that, and by Consequence of the Writ of Enquiry; for what supercedes the Judgment ought to supersede that which is grounded upon the Judgment. *Vide Br. tit. Second Deliverance. 2 Inst. 341.* And the Plaintiff in Replevin has the Distress deliver'd to him upon the second Deliverance; and if he has Judgment thereon, how shall the Avowant make up his Record of the Enquiry? And this Difference was taken between the Plaintiff in Replevin's being nonsuited, and Judgment's being against him upon *Nihil dicit*; for a Judgment upon a *Nihil dicit* is a final Bar, and no second Deliverance will ever lie after; but after Nonsuit one may have a second Deliverance, and this second Deliverance is given by the Statute of *W. 2. c. 2.* in Lieu of a second Replevin; for at Common Law, if the Plaintiff in Replevin had been nonsuited, he could have a new Replevin *toties quoties*; but that Statute in Lieu thereof gives a second Deliverance, which is a judicial Writ of the Court where the Replevin was before brought, and if he is nonsuited in that, he is gone. But since that Statute of

W. 2. the Statute 21 *H. 8. c. 19.* gives Damages to the Avowant upon a Nonsuit of the Plaintiff in Replevin, as well as upon any other Judgment in Replevin; and therefore it should seem, if the second Deliverance be made a *Superfedeas* of the *Returno habendo* and Writ of Enquiry, the Statute's giving Damages would be of no Avail. But it was answer'd to that, that being so would by no means render the Statute ineffectual as to the Damages; for if Judgment be for the Avowant upon the second Deliverance, he shall have the Damages of the Nonsuit included therein: And all the said Learning of Replevin at Common Law, and of the second Deliverance by the Statute of *W. 2. c. 2.* was agreed to by all. 2 *Inst.* 340, 341. *Dy. 41. b.* and likewise that 21 *H. 8. c. 19.* gives Damages upon a Nonsuit in Replevin, *Br. Second Deliverance. 2 Plowd. 266.* But it was strongly urged the Writ of Enquiry was superseded in this Case by the second Deliverance, which, as was agreed, supersedes the *Returno habendo*; and this Case was put as parallel with it. By Statute of *W. 2. c. 5.* Damages are given in a *Quare impedit*, yet if a *Quare impedit* be brought against a Patron and his Clerk, and they both plead the same Plea in Bar; and the Patron dies, and the Plea be found for the Incumbent, he shall have no Damages, because he can have no Judgment: So here the Judgment for a Return being superseded, there can be no Damages.

Contra were quoted *Palm. 403. Latch 72.* that the second Deliverance is no *Superfedeas*, for otherwise that Statute of 21 *H. 8. c. 19.* would signify little.

Holt: The Damages are not given by this Statute of 21 *H. 8. c. 19.* for getting the Thing avowed for from the Avowant, but for the Vexation in bringing a Replevin without Cause; and the Nonsuit is sufficient Evidence that there was no Cause of Replevin, at least it is Evidence of a Vexation; and if the Avowant cannot maintain his Avowry, the Plaintiff shall recover Damages for the Distress. If a Man brings an Action, and is nonsuited, the Defendant shall recover Damages for the Nonsuit; but if the Plaintiff bring a new Action, and recover, he shall recover Damages, but shall have nothing for the Costs of the Nonsuit; and if second Deliverance be brought before *Returno habendo* executed, it shall supersede the Execution, if after it is executed, it shall notwithstanding fetch back the Distress. *Quare quid inde venit.*

Damages are given for the Vexation in bringing Replevin without Cause.

Per:

If Order of Justices be quash'd, Order of Sessions falls of Course.

Per Cur': If the Order of two Justices be quash'd here above, an Order of Sessions confirming that Order falls of Course; for the Justices at the Sessions have not Power to make an original Order.

Order of Justices confirm'd on Appeal is final to the Appellants.

Per Cur': If an Order of Justices for the Removal of a poor Person be confirm'd on Appeal, the Appellants are ever concluded from discharging themselves of that poor Person, as to all Places; for if another Parish, than that from whence he is sent to them by the two Justices, be the last Place of his legal Settlement, they may send him thither by an Order of two Justices, to be made for that Purpose; or upon Appeal, another Place's being the Place of his last legal Settlement may be given in Evidence at the Sessions upon the Appeal. And *Note*; One cannot be removed to an extraparochial Place.

Lacy versus Kynaston.

Ante p. 221, 222.
Salk. 573.
Salk. 575.
Indenture made by A. and B. to save C. harmless, is not a De-feazance of a Covenant wherein A. is bound to pay C. a Sum of Money.

Covenant by the Wife of *Thomas Lacy*, as Administratrix to her Husband, against the Defendant, upon an Indenture bearing Date the first of *May 1676*, made between *Thomas Killegrew Esq;* and others, of one Part, and the Plaintiff's Intestate of the other Part; reciting, that several Articles had been made between the said Parties, in all to the Number of four; and that it was covenanted and agreed between the said Parties, that from thenceforth all the said Articles should be void; and that thereupon *Killegrew* and *Kynaston*, and the rest, did jointly and severally covenant and agree to and with the Plaintiff's Intestate, that if he at any Time should be minded to give over, and desist acting in the Company of Comedians of his Majesty's Theatre Royal, and would give Notice of such his Intent within six Months before, he should have six Shillings and three Pence for his Share every acting Day, and also 100 *l.* to his Executor or Administrator, within three Months after his Death; and if he died without desisting to act, and Notice as aforesaid, that then the Sum of 100 *l.* should be paid to his Executor or Administrator within three Months after his Death: And aver'd that all his Life he continued in the Company, and died in it; and for the 100 *l.* this Action was brought, it being not paid within the Time after his Death.

Upon Oyer of this Deed several Articles are set out; and the Defendant pleads in Bar of the Action, that after the Sealing and Delivery of the Deed mentioned in the Declaration, *viz.* the first of the 6th of *May* 1676. there was another Indenture made between the Plaintiff's Intestate, and the other Parties before-mentioned, of one Part, and the Defendant of the other Part, with the same Recital as in the Deed in the Declaration, and the same Articles and Covenants. But that which is relied upon is, that it is therein agreed by *Killigrew*, the Plaintiff's Intestate, and others jointly and severally, to and with the Defendant, that if the Defendant *Kynaston*, should give Notice of his Intent to give over acting in the said Companies three Months before-hand, he should have an Allowance of 6*s.* 3*d.* a Day every Acting-Day, as above, and 100*l.* should be paid to his Executor or Administrator, in case he died without any such Notice; and that it was further covenanted, that if the Defendant *Kynaston* should give any such Notice, he should be free and discharged of and from all Debts, Duties, Sums of Money, or any other Security entered into, or Thing by him taken up for the Use of the Company; and that the said *Killigrew*, *Lacy* the Plaintiff's Intestate, and the rest, should from Time to Time after such Notice save harmless and indemnify the Defendant *Kynaston*, his Executors and Administrators from all such Debts, Sum and Sums of Money, and from all Securities enter'd into for that Purpose alone, or together with the rest of the Company, or any of them, for any Matter or Thing relating to the Company; and that they should not admit any into the said Company to have the Benefit thereof, without such Person entered into the above-said Agreement; it was further agreed, that the said 6*s.* 3*d.* as aforesaid, and the said 100*l.* by the true Intent and Meaning of the said Agreement, should be in full Satisfaction of all the respective Parties Interest in the Clothes, Books, Scenes, &c. of the said Company, and that the Company should have them in Consideration thereof.

The Plaintiff's Intestate died first, but the Defendant insists upon it that he gave off Acting such a Time, and thereof gave Notice six Months before, and is not one of the Company, and so prays Judgment of this Indenture; and to this Plea there is a Demurrer.

And the Question is, whether by the Indenture made by the Plaintiff's Intestate, together with *Killigrew* and the rest of the Company, with the Defendant, to save him harmless, &c. be a Defeasance or Discharge of the Covenant wherein

Kynaston is bound to pay the Plaintiff 100 l. after his Intestate's Death. And we are all of Opinion, that it is not a Defeasance, tho' the Defendant gave off Acting, and thereof gave Notice according to the Covenant; but that it is only a Covenant, and only to be used as such, and that for these three Reasons.

If a Defeasance be to one of the Parties, it is to all.

1st, It is a Covenant made by the Plaintiff's Intestate, *Killigrew* and the rest, with the Defendant *Kynaston*, to save him harmless from all covenants entered into by him upon Account of the Company; and this must be a Covenant, and construed as such, because it is in Conjunction with others jointly and severally, and can be no more than a Covenant by them all. And tho' such an Indenture may be between the other Parties to this Deed and *Kynaston*, as here is between the Plaintiff's Intestate and him; yet that does not appear to us. Now then, if we should construe this Deed, as to the Plaintiff's Intestate, as a Defeasance, we would make it void as to the others; for if it be a Defeasance as to one of the Parties, it can be of no Purpose as to the others; and then the whole is *ipso facto* void, upon the Performance of that which makes the Defeasance, and need have no other Operation; and such Construction would alter the Frame of the Agreement, and make the Covenant of the others void.

Where Deed intends mutual Remedies, not to be construed a Defeasance.

2^{dly}, It is most apparent from the Frame of the Deed, that this is a bare Covenant, and no more. The Intent of the Deed was, that the Parties were to trust one another upon the mutual Agreement, and that that Deed should have no other Operation than to give them mutual Remedies; for there is Care taken that there should be a Saving harmless from all Manner of Incumbrances that *Kynaston* was engaged in solely or jointly upon Account of the Company. Now there are other Matters where this Clause must operate by Agreement only, and so cannot be a Defeasance; and if it were in express Terms said, that the Defendant should be saved harmless from this very Payment, as well as from the rest; yet the Intent was, that he should trust to his Agreement, and rely thereupon, and not to vacate or discharge an Agreement before, but have his Action of Covenant in case of any Charge upon him.

A Defeasance is, that upon the Conditions performed the Thing to be defeasanced is to cease.

3^{dly}, In its Nature it is not a Defeasance; the Nature of a Defeasance is, that upon Condition performed, or upon such and such Terms, the Thing to be defeasanced is to cease, and here are no such Words here, therefore there want proper Words of Defeasance; and if it be construed a Defeasance,

Defeasance, it must be, not because the Words import any such Thing, but from the Nature of the Thing; and then consider what the Consequence would be to make it a Defeasance, it would be to make the Plaintiff without Remedy. For if several covenant jointly and severally, a Defeasance to one of them is a Defeasance to all; and it is impossible to defeat as to one, without defeating as to all. If it were in these Terms, that from the Death of *Kynaston*, or his giving Notice to give over, the Covenant should be void, as to him only; yet that would discharge all the rest, for it would be a Release as to him; and if so, every one of them might plead it; and where a Lien is joint or several at Election of the Party, there a Release to one is a Release to both, for the other may plead it to Debt against him upon the Bond, &c. *vide Co. Lit.* —. And if a Defeasance works a Release and Discharge, a Defeasance to one is a Defeasance to all, as a Release to one is a Release to all; but a Case directly in Point is 34 *H. 8. Br. E-stranger al fait* 31. The Case was, whether a Defeasance of a Bond could be good to a Stranger to the Bond; as if *A.* be bound to *B.* in a certain Sum, and *B.* covenants and grants with *C.* a Stranger to the Bond, that if *A.* did such a Thing the Obligation should be void, and held that it could not be a good Defeasance; but if *A.* and *B.* be bound to *C.* and *C.* agrees with *A.* that upon doing such a Thing the Obligation shall be void, that will be a good Defeasance to *B.* because a Discharge to one is so to the other. Now, to construe this Covenant a Defeasance would destroy the whole Agreement. And to make such a Construction as would destroy a Man's Security, and defeat him of his Covenant and Agreement that he had made and procured for his Safety, would be a very injurious one.

Obj. A perpetual Covenant amounts to a Release.

Ans. A perpetual and absolute Covenant, for Example, A Covenant to an Obligor, that the Oblige would never sue upon the Obligation, is a Release; or if it be with Condition never to sue, it will be a Defeasance, tho' there be no Words not to sue in the Obligation, but only in the Condition of it; and the Reason of this is to avoid Circuity of Action; because there one should precisely recover the same Damage that he had suffered by the other's suing the Bond. *A.* is bound to *B.* and *B.* covenants never to put the Bond in Suit against *A.* if after *B.* will sue *A.* on the Bond, he may plead the Covenant by Way of Release. But if *A.* and *B.* be jointly and severally bound to *C.* in a Sum certain, and *C.* cove-

A Defeasance to one is a Defeasance to all.

A Covenant that the Oblige would never sue is a Release.

Hard. 113.
21 H. 7. 23,
24. v. 3 Lev.
42. 1 Inst.
126. b.

nants

If *A.* and *B.* be jointly and severally bound to *C.* and *C.* covenants not to sue *A.* it is not a Defeasance. Vide 1 Inst. 146. b. 267.

nants with *A.* not to sue him, that shall not be a Release, but a Covenant only; because he covenants only not to sue *A.* but does not covenant not to sue *B.* for the Covenant is not a Release in its Nature, but only by Construction to avoid Circuity of Action; for where he covenants not to sue one, he still has a Remedy, and then it shall be construed as a Covenant, and no more. 48 *Aff. pl.* 44. A Man made a Feoffment in Fee with Warranty against all Persons, Feoffee by his Covenant grants and agrees not to take Advantage of this Warranty, and then he is impleaded, and vouches the Feoffor, he may plead this Covenant in Bar of the Warranty; because the Feoffee has bound himself thereby not to take Advantage of the Warranty; but if the Covenant had been not to bring a *Warrantia Charta*, or not to vouch, then it had been a Covenant only, and the Covenantor hath other Remedy and Use left him of his Warranty; and the Covenant would not be a Release in that Case, because it does not exclude all his Remedy upon the Warranty. So then, if two be jointly and severally bound, and the Obligee covenants with one of them not to sue him, yet he may sue the other; because he might without his Covenant sue one of them without the other; and therefore, there being nothing in the Covenant to preclude him from that Benefit, he has it still left in him; and here the Plaintiff's Intestate, notwithstanding this Covenant, has Remedy against the other Covenantees; therefore *Kynaston* cannot use it as a Release; for then it would be a Release to all the rest, which would be contrary to the Nature and Frame of the Deed. Vide 2 *Vent.* 217. *Gawden* and *Dra-per's* Case. *A.* covenants with *B.* to pay him 300 *l.* for the Use of the Wife of *A.* only for her Life; and Covenant brought upon this, and Breach assigned, that there was so much of the 300 *l.* Arrear; Defendant pleads, that there was another Indenture between him and the Plaintiff since the Date or Delivery of the Covenant Deed declared on, reciting the said Covenant and Agreement for the Payment of the 300 *l.* wherein it was covenanted and agreed, that so long as *A.* and his Wife did cohabit, the Payment of the 300 *l.* should cease, and avers, that they did cohabit for the Time the said Arrear became due, and pleads this in Bar of the first Agreement; and there are exprefs Words that the Payment should cease during the Cohabitation; and there had been no great Harm to construe this as a Release of the Arrearages during the Cohabitation; but yet it being a Sum in Gross, and the Covenant temporary and not perpetual,

tual, they held it no good Bar; but he said, if it had been a Rent for Years, and a Covenant or Agreement by the Lessor to Lessee, that it should not be paid, or that it should cease for such a Time, that would amount to a Grant of the Rent for so long, and it would in that Case cease and revive again; but this was a Sum in Gross; and tho' it was defeasible, yet because it was not intirely defeafanced, they would not allow a subsequent temporary Agreement to be a Release of it. And so *per totam Cur'* the Plaintiff had Judgment.

Dom' Rex vers. Jonson, and Idem vers. Fenwick.

THE Justices of Peace at the Sessions, without any previous Application to the Justice of Peace, or Magistrate of the Corporation, made an Order for discharging an Apprentice from his Master; and likewise that the Master should refund some of the Money that he had received with the Apprentice; and the great Debate was, whether this Order, being made at the Sessions, without any Application to a Justice of Peace, &c. was not void and *coram non Judice*; for it was said, the Sessions had no Jurisdiction of the Matter, but when it came before them by Way of Appeal. And *Holt* after great Consideration said, that if it were a new Thing, he would be of Opinion, that the Justices at Sessions ought not to meddle with it at the first Instance; but since there have been so many Orders made so by them, and that the Usage had so prevail'd, he would not alter it now; and as to the restoring the Money, he said, the Order was very good in that Point, for the Words of the Statute are, *That they shall do what in Equity they shall think proper*: And the Order affirmed *per Cur'*.

Sessions may make original Order to discharge Apprentice. Salk. 68. Ante p. 498.

Dom' Rex versus Inhabit' Paroch' de Aicles.

A Boy set out an Apprentice to a Master in one Parish, who by Writing did assign and turn him over to another Master, where he served his Time in the Parish of *A.* and the Boy being now poor, the Question was, whether he had gained a legal Settlement in *A.* and an Order of two Justices was for removing him to another Town, as not legally settled in *A.* because an Apprentice is not assignable in Law. And *per Cur'*, It is very true, an Apprentice is not

Apprentice in Law is not assignable; but if under the Assignment he serves his Time in another Town, he gains Settlement there.

assignable; yet here the Boy served during his Apprenticeship in the Parish of *A.* and if one Master makes a Contract with another, that the other shall have the Service of his Apprentice, that is good between themselves; and tho' the Words be *grant, assign and turn over*, which indeed cannot alter the legal Interest of the Apprentice; yet it amounts to an Agreement, that he shall serve the other during the Time; like the Case where one assigns over a Bond to another, which in its Nature is not assignable over, but if he does assign it over, it is a good Agreement, that the Assignee shall have the Money to his own Use; and so is the Case of *Deering v. Farringdon*, where one was to receive a Proportion of Damage from the Town of *Hamborough*, and it was stipulated, that the Town should pay so much to the Parties that had suffered, one whereof assigned his Part or Proportion of the Reparation to another, notwithstanding which he after received the Money to his own Use; whereupon the Assignee brought Covenant against him, and the Words of the Deed were only *Assignavit & transposuit*; and tho' the Thing in its Nature was not assignable, yet it was enough to bind Assignor to suffer the Assignee to enjoy it. So here, in Strictness, an Apprentice is not assignable over, yet by Agreement between the Masters, it may be so far done, as that Covenant lies for an Interruption of Enjoyment of his Service; then the Apprentice serving upon such an Assignment, is a good Service of an Apprentice; and therefore sufficient to give him a Settlement in *A.* and the Order was quashed.

Writ of Appeal should be return'd *Non inventus* before *Capias* goes.

Per Cur': The original Writ of Appeal ought to be return'd *Non est inventus*, before a *Capias* awarded.

Attorney not to deliver Writings without Payment.

Note; Court will not compel an Attorney to give Writings, without the other Party agrees to pay him his reasonable Demands.

The Disposition of Pews belongs to the Ordinary. If one purchase a Pew, his Interest therein ceases by ceasing to be a Parishioner.

Per Holt: Of common Right the Disposition of Pews in a Church belongs to the Ordinary, but the Parish is bound to repair them; and it is only Resiency that makes Right to a Pew in a Parish; for if one purchase a Pew there, and after leaves it, his Interest in the Pew is gone; and if he should return again into the Place, yet he must renew his Interest; but if a Person ceases to be a House-keeper in a Parish, but continues still in the Parish as a Lodger, and

goes to Church, and is taken Notice of as a Parishoner, tho' he be but a Lodger, yet his Interest which he had in the purchas'd Pew continues.

None can be admitted to give Evidence of what was done at the former Trial, without the Proceedings thereat be proved.

Proceedings at former Trial must be prov'd before Evidence of what done there. Poitea p. 565.

Note; To maintain Action for the biting of Defendant's Dog, it must be proved that he knew his Dog to be used to bite; but one Instance is sufficient in that Case, tho' to satisfy the Words of the Statute of — *El.* — concerning Leases of Lands usually letten, the Lands must have been letten twice at least.

In Action for a Dog's biting, must prove the Owner knew the Dog us'd to bite.

Anonymus.

IN Case for a malicious Prosecution for Felony, brought after Aquittal, it was agreed that the Declaration must agree with the Indictment substantially; and here the Indictment being for stealing *unum sintinulum*, *Anglice* a Callico Quilt, and the Declaration *unum finitunculum*, it was adjudg'd a material Variance; but the Declaration having besides laid generally, that he charged the Plaintiff with Felony before a Justice of Peace, it was held sufficient to maintain the Action; and likewise that it was necessary for Defendant here to prove a Felony committed, and also a probable Cause of Suspicion.

In Case for malicious Prosecution for Felony, the Declaration must agree with the Indictment.

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Term. Sanct. Mich.

Anno 13 W. III. in B. R.

Information
for pretending
himself to be
bewitched.

ONE *Hathaway*, a most notorious Rogue, feign'd himself bewitch'd and depriv'd of his Sight, and pretended to have fasted nine Weeks together; and continuing, as he pretended, under this evil Influence, he was advis'd, in order to discover the Person suppos'd to have bewitch'd him, to boil his own Water in a Glass Bottle till the Bottle should break, and the first that came into the House after should be the Witch; and that if he scratch'd the Body of that Person till he fetch'd Blood, it would cure him; which being done, and a poor old Woman coming by Chance into the House, she was seized on as the Witch, and obliged to submit to be scratch'd till the Blood came; whereupon the Fellow pretended to find present Ease. The poor Woman hereupon was indicted for Witchcraft, and tried and acquitted at *Surrey* Assizes before *Holt*, C. J. a Man of no great Faith in these Things; and the Fellow persisting in his wicked Contrivance, pretended still to be ill, and the poor Woman, notwithstanding the Acquittal, forced by the Mob to suffer herself to be scratch'd by him. And this being discover'd to be all Imposition, an Information was fil'd against him.

— versus *Tracy*.

On Rescous
return'd it is
not travers-
able.

MOVED for Leave to file an Information against him for rescuing a Person from Sheriff in the *Temple*; but *per Cur'*, you had better get a *Rescous* return'd, and bring an Action upon the Case against him; and the *Rescous* after Return thereof is not traversable: And tho' the usual Fine upon

upon a *Rescous* return'd be only four Nobles, yet sure that must be understood where the Person rescued is retaken, otherwise the Fine may be higher.

Sheriff of Cumberland's Case.

P*ER Cur'*: It is the constant Practice for Sheriffs to take Bail-Bonds, according to 23 *H. 6.* from Persons taken up upon Attachment; and no Remedy against him upon a *Cepi* return'd, if he has him not at the Day, but to amerce him.

Sheriff takes Bail-bonds on an Attachment.

Sutton the Marshal's Case.

HE had disturb'd the Steward of the Prison, upon his coming into the Office, supposing his Right to have determin'd with Estate of the former Marshal who put him in, and had but an Estate for Life in the Office; and it was now moved by *Brotherick* that he might be ruled to suffer him Quiet, alledging that his Estate was a Fee, or at least for his own Life, and not determinable by the Estate of Grantor; and compared it to the Case of Secondary of the Court, who is put in by the C. J. yet continues in after Death or other Determination of the Office of C. J.

Whether the Steward of the Prison be an Officer for Life, not removable by the Marshal.

Holt: The Cases are not parallel, for by ancient Custom of the Court it is, that an Under-Officer's Place of this Court does not determine with that of C. J. who puts him in. And there is a vast Difference between an Office by Custom only in the Grant of a Superior Officer, and an Office derived out of the Interest of another; and the Office of Marshal of *King's Bench* is an Office of Inheritance, and the Under-Offices are derived out of it; and therefore if that Office, that is an Inheritance, be granted for Life, all the Under-Offices that are inferior to, and derived out of his Estate, and in the Gift of him that has the Estate for Life, are determinable upon his Estate; and there can be no Custom to the contrary, because the Superior Office being an Inheritance could not stand in need of the Support of a Custom. But if Tenant or Life of the Office of Marshal grant such inferior Office for Life, and then surrenders, that Surrender shall not alter or destroy the Estate of the Grantee, because Grantor shall not by his Act defeat his

If Tenant for Life of the Office of Marshal grant an Office for Life, the Surrender of his Office shall

7 C

Grant

not defeat the Estate of the inferior Officer.

Grant; for that Reason, if he forfeits his Estate, yet the Under-Grantee shall continue in for Life of Grantor; as if Tenant for Life make a Lease for Years, and then surrenders or forfeits his Estate, yet the Lease for Years remains good during his Life, if the Years continue so long. And tho' the late Marshal's Place be determin'd by Parliament, yet that shall not affect the Under-Officer; for it is for the Marshal's own Offence that he is turn'd out, which shall not prejudice his Grantee; as if Lord of a Manor in Fee grant to another the Office of Bailiff of his Manor, and that he shall have certain Fees arising from the Execution of his Office, he or his Heir shall not turn him out. However, let us see Precedents of Grants of Office of Steward, how it was antiently granted; and the Matter being moved again, *per Cur'*, the Steward is not an Officer Attendant on the Court, and therefore is not intitled to Relief thus upon Motion; and besides, if his Office concerns the safe keeping of Prisoners, he cannot be imposed upon the Marshal. *Et sic finit.*

Per Cur': If there be Demurrer to Part, and Plea to Issue to Part, and Judgment upon the Demurrer before the Issue tried, the Plaintiff, if he pleases, may enter a *Non Prof.* upon the Issue, and take a Writ of Enquiry of Damages upon the Judgment on Demurrer, but it is not to be taken out till after *Non Prof.* enter'd on the other; for if they will proceed upon the Issue, the Jury that try it ought to enquire of the Damages on the other: And here, because a Writ of Enquiry was taken out without entring of *Non Prof.* that Matter was moved in Bar of final Judgment, and thereupon it was stay'd till they moved of the other Side.

Chancery.
If one under
Pretence of be-
ing insolvent
gets an Abate-
ment of a
Debt, it will
be set aside in
Equity.

Note; In the Case of *Monger* and *Kett* in Chancery, it was held by Court, that if there be two Dealers, and one of them is very much indebted to the other; and in order to get an Abatement from him, he makes him believe he is insolvent by absconding, sculking, or shutting up Shop, whereby the other has just Cause to fear the Loss of his Debt; and thereby procures a Release or an Abatement, when in Truth the Man was really solvent, that that Court would relieve against such Release, &c. And this was agreed to have been often done, and the Case of *Bonny* and *Bonny* quoted for an Instance; *secus* if the Party had not just Cause to fear the Loss of his Debt.

It was also there held, That if *A.* mortgage Land to *B.* for 100*l.* and *A.* owes *B.* also 100*l.* by Contract or Bond, *A.* shall be admitted to redeem the Mortgage, without paying the 100*l.* by the Contract or Bond, but is left to his Remedy on his Contract or Bond; and hereupon *Pooley* at Bar said, that if I have several Mortgages upon several Lands, for 100*l.* each from the said Person, and one of the Mortgages proves a bad Title, and the other good, the Mortgager shall redeem the good one without paying of the Money upon the bad one.

If one owes Money by Mortgage, and also by Bond, he shall redeem the Mortgage without Regard to the Bond. *Quer.*

If one owes forty Pounds by Bond, for the Payment of twenty at such a Day, and twenty Pounds by Contract to the same Person, payable at the same Day; and at the Day he pays twenty Pounds, without telling for which it is, it shall be a Payment in Equity upon the Bond, because that is most penal upon him.

Payment shall be taken on that which is most penal.

Per Holt: If an Overseer of the Poor contracts with Tradesmen upon Account of the Poor, and upon his own Credit, as soon as he receives so much of the Poor's Money, it becomes his own Debt.

Overseer of the Poor.

Per eundem: Five Justices of the Peace are too many to join in an Order for settling of a Poor; for they may well make a Majority at the Sessions, and so confirm their own Order.

Five Justices should not join in Order of Sessions, on Appeal.

Per eundem: A Render of Principal in Discharge of his Bail is not an Execution till *Committitur* enter'd; for till then the Plaintiff has his Election, whether he will have him in Execution or not; but if the *Reddidit se* be in Presence of Plaintiff, and then he is committed, it shall be adjudged an Execution. And a Delivery to the Tipstaff is a Commitment to Marshal, for the Marshal is supposed present in Court. And *Note;* In this Action there must be a Copy of the Judgment and of the Commitment given in Evidence.

Render of Principal in Discharge of Bail is not an Execution till *Committitur* enter'd.

Note; Per eundem: A Corporation is not indictable, but the particular Members of it are.

Corporation is not indictable.

In

Chancery.
Trustees not
answerable for
each other.
Brid. 35.
Cro. Car.
312.
2 Vern. 515,
570.
Salk. 318.

In Chancery, *per Wright*; If there be two Trustees, one of them shall not answer for Receipts by the other, but each is to answer for himself; and Trustee ought not to pay Costs where there is not Default in him. Lands were devised in Trust for two young Ladies; and if they died within Age, and before Marriage, the Remainder over; now the youngest, being sixteen Years old, and the other eighteen, they brought their Bill for Execution of the Trust, but it was dismiss'd for want of making the Remainder Man Party.

Trustees having Power to appoint Agents; not answerable for them.

If one devise to Trustees, and by express Clause therein gives them Power to appoint Agents to manage the Land, and they appoint one then solvent and good, tho' after he prove insolvent, they shall not answer for him; *secus* if he were not solvent at the Time at which he was nominated. But if there were no such Direction or Power in the Will, the Trustees are bound to answer for their Agents at all Events: So in Case of Money to be laid out at Interest.

Appeal lies from Justices to Sessions, in respect of Overseers Accounts.

Per Cur': Justices of Peace are not absolute Judges of Accounts of Overseers of Poor, but an Appeal lies from them to the Sessions, in Case of Overcharge or other Wrong; but Justices may audit the Account of the Overseer before the Year be out, if not in case he be turn'd out before that Time.

If Notice of Trial be countermanded, must pay Costs.

If upon Notice of Trial Defendant draws Breviats, retains Counsel, and makes ready his Witnesses, before that Notice is countermanded, upon Affidavit thereof, and Motion, he shall have such Costs as Master shall tax.

Release of Errors.

If Judgment be irregularly obtained, a Release of Errors sets it right to all Purposes.

If one for Want of Bail is turn'd over to the Marshal gets himself turn'd over to the Fleet, he may be declared against *in Custodiâ*, *per Holt*.

Per Holt: One arrested by Process of this Court, for want of Bail, goes to Custody of Marshal, and after by *Hab. Corp.* gets himself turn'd over to the Fleet; sure the Plaintiff shall not thereby lose the Benefit of declaring against him in Custody of Marshal. But if he removes himself in that case out of Custody of Sheriff into the Fleet, so that he never was in Custody of Marshal; *quære*, for there may be a Difference, tho' even there it will be dangerous to suffer such Removal to Prejudice of the first Plaintiff's Action.

Note; Before the late Act of Parliament, one in Prison of Fleet could not be declared against, without bringing him by *Hab. Corp.* into Court; but the Course here was to leave Declaration with the Turnkey.

Indictment for using a Trade for three Months, from such a Day to such a Day, not having served seven Years, &c. Not guilty pleaded; and the Defendant found guilty for one Month, and acquitted of the rest; and it was moved in Arrest of Judgment, that it was uncertain for which of the three Months he was found guilty; and therefore the Defendant could not plead this Conviction in Bar of another Indictment for the same Offence: But *per Cur'*, he may plead a Conviction for one Month, *absque hoc*, that he was guilty in any other Month. *Et Jnd. pro Rege.*

Conviction of using a Trade &c. for one Month, on Indictment for using it for three Months, may be pleaded in Bar, *absque hoc*, he was guilty in any other Month.

In Chancery, if a Bill be dismiss'd with Costs, it is a good Plea in Bar to another Bill for the same Cause, without Oath that the Matters are the same, only Counsel's Hand being to it; and one may add a new Defendant without paying Costs, so such Addition does not make the other Defendants to change their Answer.

Chancery. Bill dismiss'd with Costs, good Plea in Bar to new Bill for the same Matter, if Counsel's Hand be to it.

Sir Richard Leving versus Lady Calvry.

IN Error, Want of Original assign'd for Error, the Original having been lost upon the Death of the Plaintiff below's Attorney; upon Affidavit of this Fact the Lord Keeper granted them a new Original, and that should be certified, and a *Certiorari* being brought, and the Original being certified, now the Defendant in Error would bring on the Matter in order to have his Judgment affirm'd, and Costs. And now it was moved that this would be very hard upon the Plaintiff, who at the Time of the Writ of Error brought had good Cause, tho' that were now cured by a new Original; and for this the Case of *Naydon* and *Winterbotham*, about three Years before, was cited. But *per Cur'*, The Plaintiff cannot discontinue his Writ of Error without Leave of the Court; for if you do not assign Error we will affirm the Judgment, and the Court would make no Rule.

Writ of Error cannot be discontinued without Leave of the Court; and if no Error assign'd, Judgment will be affirm'd.

Dominus Rex versus Fitzgerald.

Whether a Person bound by Recognizance to appear the first Day of the Term, on entering Appearance after, may imple till the next Term.

HE was bound by Recognizance to appear here the first Day of Term, and was called on, but did not appear; but came after and entered his Appearance with Mr. *Harcourt*, his Clerk in Court, and would imple till next Term; which the Attorney General did oppose, for that he ought only in this Term to imple to *crastin' animar'*. And heretofore when one came in upon a Recognizance, he must have pleaded *instanter*, so it was if he came in upon a *Hab. Corp. reddidit se*, or Exigent; but this was thought hard, and is remedied since the Revolution.

Dominus Rex versus Young.

Ante p. 544, 545. When an Indictment comes into B. R. it may either be tried there, or sent back, as the Court thinks proper.

THIS Case being moved again; *per Holt*, to try the Defendant in this Court, there must be a *Ven. Fa.* returnable at the common Day, and fifteen Days between the Teste and Return of it: And tho' the Record of the Outlawry, and all the other Proceedings against him be in this Court, yet by the Statute of 6 H. 8. c. 6. we may send them down to the *Old-Baily*; but we could not send them a Record of an Indictment before that Statute; and such Cases have been sometimes tried at *Nisi prius*. And he quoted the Case of one *Turner* in my Lord *Hale's* Time, who was brought hither from the *Old-Baily* to reverse his Outlawry; and the Court were clear for sending him back, if the Prosecutor had not desired he should be tried here. And in all Cases whatsoever, where the Indictment happens to come hither, tho' it be not by *Certiorari*, we may in our Discretion send it back: And so it was ruled here.

Nailor's Case.

Ne exeat Regnum; a Person in Custody thereon may be brought to B. R. to be charged with an Action.

HE was a Prisoner in the Counter for Want of Bail, and a *Ne exeat Regnum* directed out of Chancery to the Sheriff of *London*, to hold him to Security not to leave the Kingdom without Licence; and a *Hab. Corp.* being moved for, in order to charge him with an Action in this Court, *Brotherick* objected, that he could not be turn'd over to the Marshal, for then the Sheriff of *London* could

not obey the Mandate of the *Ne exeat Regnum*, viz. to detain in Custody till he found Sureties, &c. and he said the Suggestion of that Writ is, that the Party has some ill Design against the Government, and is not traversable; and to prevent his executing such Design is the End of the Writ; and some of them mention a Sum certain that he is to find Security in; others leave that Matter to the Sheriff, who, upon Default of such Sureties, is to carry him to the common Gaol of the County, there to be safely kept till he voluntarily give such Security; and this is to be certified by the Sheriff into *Chancery*: And there is no way to discharge this, but by a Passport under the Great or Privy Seal, or Privy Signet.

Holt: Suppose he had been in the Sheriff's Custody, by a Writ of this Court, at the Time of the *Ne exeat Regnum* coming to him, as you would have it, he cannot be removed out of his Custody; so that the Writ would be a kind of a Sanctuary to him. It is true, if the Sheriff take the Security, he ought to certify it into *Chancery*; and it is true it is out of the Sheriff's Power, by the Removal, to detain him, or take Security; but we may keep him in our Custody till he find Security, and so there will be no Mischief; but if we take it we may keep it here. And here the Writ has no Sum certain, and this Writ is not an Action as a *Homine replegiando*; and all the Sheriffs in *England* are Officers to this Court; and it is very extraordinary, when one is in Prison for Want of Bail, to charge him with a *Ne exeat Regnum*, and it looks like a Trick to prevent a *Hab. Corp.* But the *Hab. Corp.* was granted.

Vines versus Doderidge.

Prohibition moved for to stop a Suit in Spiritual Court for Tithes, upon Suggestion, that there was a *Modus* to pay two Shillings in the Pound of yearly Rent for all Tithes. *Modus* to pay two Shillings in the Pound for Tithes, whether good;
Holt: A *Modus* must be of something certain, that may be demanded in the Spiritual Court; and here, suppose the Land be let out for a Fine and five Shillings Rent, what becomes of the *Modus*, or of the Parson; and a Custom cannot be laid in a Rent, which is alterable at Pleasure of Parties; and besides this Custom would amount to a Plain *Non decimando*. Vide the great Case in *Ro. Ab.* 378. to pay two Shillings for all Tithes. *Hob.* 192. And he said, if

if the Case of *Perkin* and *Perkin* came in Question again, he would desire to hear it argued, for he was not satisfied with the Judgment of it.

Habeas Corpus
returnable at
a Day certain.

A Prisoner was brought up by *Hab. Corp.* returnable at a Day certain, and the Gaoler did not bring him into Court, but carried him back, and brought him in the next Day; this being a Writ returnable at a Day certain, you cannot bring him in at another Day by Virtue of it. *Secus*, if the Writ were returnable *immediate*; and Gaoler ruled to be at Charge of new Writ.

Turner versus Burnaby.

Attornies of
each Side
may agreee to
name twenty-
four Persons,
out of which
Sheriff may
return twenty-
four to try the
Issue.

TWO Attornies at the Tavern agreed each to name twenty-four to the Sheriff, out of which he should return twenty-four to try an Issue. And *per Cur'*, If Sheriff will return a Jury at the Denomination of any Person, it is a Misdemeanor in him, and it may be Maintenance in him at whose Request it is done; but here it being by Consent of Attornies of either Side, *Consensus tollit Errorem*.

At Nisi prius coram Holt.

If Servant
usually em-
ployed to bor-
row Money,
or pawn
Goods for the
Master, does
it, Debt will
lie against the
Master.

IF a Servant usually employ'd to pawn Goods for his Master, or to borrow Money for him, borrow of me, or pawn his Master's Goods with me for Money; I shall maintain Debt against the Master thereupon. 2dly, If my Servant has a Note for Money due to me, or other Goods, which in their Nature are not properly in the Custody of a Servant, that is Evidence *prima facie* that he has an Authority from me to apply them to such Use as he does after put them; but the contrary may be given in Evidence, as that he came by the Note by undue Means, or had it to another particular Purpose. 3dly, If a Man has a Bill of Exchange, he may authorize another to indorse his Name upon it by Parol; and when that is done, it is the same as if he had done it himself. 4thly, If I pawn Goods to A. for such a Sum, A. may have Debt for the Money, notwithstanding his having a Pawn. *Per Holt, omnia.*

A Man by Pa-
rol may autho-
rise another to
indorse his
Name on a Bill
of Exchange.

Evidence.
One not to be
Witness where
he may be
interested.

Ibidem this Case happen'd: A. being indebted to B. gives him a Note in a feign'd Name for the Debt: After the

the Wife of *B.* runs away with another Man, and takes the Note with her; *A.* pays the Money to *B.* the Person with whom the Wife ran away sues *A.* for the Money in the feign'd Name. And at the Trial *B.* offer'd to make Oath of all this, but was rejected *per Holt*, for it was to prove a Right in himself to the Money received from *A.* for which otherwise he was accountable to *A.*

Holden versus Sutton.

DEBT by an Executor for an Escape of one in Execution on a Judgment of Testator, and declared in the *Debet* and *Detinet*; and after Verdict this moved in Arrest of Judgment. And it being doubted whether it was helped by the general Words (of Matters of like Nature) in the Statute of 16 & 17 Car. 2. to maintain it at another Day, were quoted 1 Sid. 379, 341. 2 Keb. 407. that is, that it was helped after Verdict; but *Holt* said, that *Debet* always is where the Action is in the Party's own Right. *Et adj.*

Whether Debt by Executor for an Escape of one in Execution of a Judgment of the Testator in the *Debet* and *Detinet*, be helped by Verdict.
1 Lev. 250, 251.
1 Lev. 130.

Per Holt: Upon a Reference to the Master, if upon Service of a Rule to attend him, one of the Parties will not attend, the Course is to move Court that Master may examine *ex parte*, and so make a Report.

Reference to a Master.

To have Security of Peace of one, you must make Affidavit of the Cause of Fear, and exhibit it in Articles; and then make Affidavit that you demand this not of any ill Will or Malice, but out of Fear of some bodily Hurt.

Surety of the Peace.

Bond may be sealed with a Wafer. Copy of Bill in Chancery taken from File with Six Clerk's Evidence. One cannot give Evidence of any Thing done at a former Trial without producing the Record of the former Trial.

Ante p. 555.

Per Holt, at *Nisi prius*: *A.* orders *B.* to receive Money from *C.* for him, *B.* orders *C.* to pay the Money to *D.* to whom *B.* owes Money; *C.* accordingly does pay it; *A.* shall maintain an Action against *B.* as for so much Money received to his Use: So if in that Case *B.* had drawn a Bill upon *C.* for the Money, or generally for so much Money, if *C.* has no Effects of *B.* in his Hands; his answering such Bill is a Payment of *A.*'s Debt to *B.* for which *A.* may maintain his Action against him.

Distribution
in Spiritual
Court and
Chancery.

Per eundem: There never is a Distribution ordered by the Ecclesiastical Court but where the Party dies Intestate, or the Will directs it; but Chancery does sometimes enforce a Distribution where the Will does not direct it.

Wife's Con-
versation Evi-
dence against
Baron.

Debt by Husband; and it appearing to have become due to his Wife as a separate Dealer, a Discourse of the Wife's concerning it was given in Evidence for Defendant, *Annuente Holt*.

Elizabeth Claxton's Case.

Good Beha-
viour.
Justice of
Peace may
oblige lewd
Person to find
Security for
Good Beha-
viour.

SHE was committed to *New Prison* by Justice *Perry*, there to remain till she found Security for her Good Behaviour, for being taken in a disorderly House; and being brought up by *Habeas Corpus*, and then her Counsel moved for her Discharge. 1st, Because that being taken in a disorderly House was no Reason to require Sureties of the Good Behaviour; for that any honest Person might accidentally be there, and know nothing of its being such a Place; *quod fuit concessum*. 2^{dly}, That in case it were Cause, yet the Commitment is to an illegal Gaol, *viz. New Prison*. 3^{dly}, That in case a Woman's being taken in a disorderly House be Reason to take her for a lewd Woman, and so within the Jurisdiction of a Justice of Peace by the 49 *El.* yet the Way was to send her to the House of Correction, but not to require Sureties of the Good Behaviour of her.

Extravagant
Persons, who
have no visible
Way of Live-
lihood, to find
Sureties of
Good Beha-
viour.

Holt: It is not true to say, that every one that has not a visible Way of living shall be liable to find Sureties of the Good Behaviour. Indeed if one lives extravagantly and high, who has no visible Way of getting, it may be reasonable to inquire how he lives; but if a Man lives in a reasonable quiet Manner, it is hard to hold him to it. But lewd and disorderly Persons may be held to the Good Behaviour, or committed to Gaol, or they may be sent to the House of Correction. But what is it makes a lewd Person? It is not being caught in an House of Bawdry, or a disorderly House, at a seasonable Time. And tho' a Justice of Peace may be a Judge of who is a lewd and a disorderly Person, and therefore if the Commitment had said, that it had appeared to him that this Person was such, we would have taken his Word for it; yet when he assigns the Reason of his Judgment, and we find that Reason will not maintain it, we are not to re-
gard

Justice is
Judge who
are lewd Per-
sons.

But if assigns
a Reason for
his Judgment,
which is not
a good one,
Commitment
will be quash-
ed.

gard his Judgment; and as Persons of ill Behaviour are to be punished, so great Care is to be taken of the Innocent. And being remanded, and brought up again at another Day, several *Affidavits* were read of her Lewdness; whereupon the Court quashed the Justice's Commitment, and ordered a Rule to be drawn for her Commitment to Marshal thus: *Because it appears to us, that she is a lewd Woman and a Frequenter of Bawdy-houses; ideo she is committed till she find Sureties of Good Behaviour.* And Holt quoted 13 H. 7. 10. That Constable may commit lewd Women till they find Sureties, and Neighbours are bound to assist.

Constable may
commit lewd
Women.

In Action for Words a Rule was, for the Sheriff to return a special Jury, who, notwithstanding the Rule had been served upon him, return'd only a common Jury; after Trial this was moved by Defendant for a new Trial, which was denied, because he had made a Defence; for since, if the Verdict had gone for him, he would have had the Advantage of it, it is fit he should submit to it, that it is gone against him; *secus* if he had not made a Defence.

No new Trial
shall be where
Issue was tried
by a common
Jury, when it
should have
been by a spe-
cial one, if
Defence was
made.
Vide postea in
this Term,
Watson v.
Sutton.

Dundee versus Petty.

A *Capias* being returned against the Principal, he brings Error immediately, and the Plaintiff brings Debt upon the Recognizance against the Bail, and delivered a Declaration as of the precedent Term. And Mountague moved for an Imparlane; he urged, that if the Plaintiff had gone by Way of *Sci' fac'* the Bail might render the Principal at any Time before the second *Sci' fa'* returned. *Vide Raym.* 14. *Godlington v. Lee.* And there is no Reason but the Bail should have the like Time in this Case; and this he cannot do without the Favour and Assistance of the Court, for the Recognizance being forfeited by the *Non est inventus* return'd upon the *Capias*, a subsequent Render of the Principal cannot be pleaded in Bar of the Action. And the Court after made a Rule; there should be in this Case eight Days in full Term for the Bail to render the Principal. And *per Cur'*, after *Capias* returned against the Principal, tho' Writ of Error be brought, yet Plaintiff may proceed against the Bail; for the Writ of Error does not supersede the Recognizance.

After *Capias*
returned a-
gainst the
Principal, the
Plaintiff may
proceed a-
gainst the Bail,
tho' there be
a Writ of Er-
ror.

Hayward

Hayward versus Kinsey.

Whether an Original in *Clausum fregit* sued out in *Dorsetshire* above six Years, and Case thereon within six Years in *London*, will prevent Statute of Limitations.

ERROR of a Judgment in the *C. B.* in Case laid in *London*, wherein the Plaintiff below declared, that the Defendant's Testator the 5th of *March* 4 *Jac.* 2. was indebted to the Plaintiff's Intestate in 40*l.* Money lent, &c. and also in the like Sum of 40*l.* on Account, and promised Payment, &c. Defendant pleads *Non assumpsit infra sex annos*. Replication, that the Plaintiff's Intestate the 8th of *May* 4 *Jac.* *suprad'* did sue out a *Quare clausum fregit* against the Defendant's Testator in the *C. B.* directed to the Sheriff of *Dorsetshire*, with Intent, upon the Defendant's Appearance thereunto, to declare against him *ex causa prad'* now in the Declaration set forth, but that he did not appear, but died the 12th of *April* 1693. that the Defendant was his Executor; that the Plaintiff's Intestate *recenter postea*, viz. such a Day, sued out another *Quare clausum fregit* against the Defendant directed to the said Sheriff of *Dorsetshire*, returnable such a Day, with Intent, upon the Defendant's Appearance thereunto, to declare against him *ex causa prad'*, but the Defendant did not appear; that after at such a Time, the Plaintiff's Intestate died, and Administration was committed to the Plaintiff, who *recenter postea*, viz. 7th of *April* 1697. about fifteen Months after the Administration committed, sued out the Writ on which he now declared. Upon Demurrer to the Replication, Judgment was for the Plaintiff in the Common Pleas, of which this Error is now brought.

Maxim.

Tho' personal Action may be laid any where, yet if the Cause of Action appear to arise in another County, the Venue will be changed.

Now it was argued for the Plaintiff in Error by *Cheshire*, that this Original sued out in *Dorsetshire* did not serve this Action being laid in *London*; for it is a Maxim, that *quælibet narratio super Breve locari debet in Com' in quo Breve emanavit*. And tho' the Plaintiff in a personal Action has Election to lay his Action in what County he will; yet that must be at the Commencing of his Action; for if it appear to the Court, that the Cause of Action did arise in another County, they will change the Venue to that County; as if Assault and Battery be in *London*, the Party may lay it in what County he pleases; but if he sue an Original to Sheriff of *Middlesex*, and declare in *London*, it will be bad. *Cro. Jac.* 479, 674. In an *Indeb'*, Original was directed to the Sheriff of *Devon*, and the Action laid in *Exeter*, and for that, ill. *Cro. Car.* 272. That an Original in one County cannot warrant an Action in another County; and therefore it

it shall be intended without Original, which is help'd by the Statute. 1 Cro. 281. And *Mosse* and *Bruerton's Case*, Pasch. 11 W. 3. *Assumpsit* laid in *Norfolk*, *Non assumpsit infra sex annos* pleaded; and an Original taken out in *Suffolk* replied; and a Judgment for the Plaintiff in *C. B.* reversed for this Error. And it will not suffice to say this is the Course of the Court of *C. B.* and the Course of a Court of *Westminster Hall* is the Law of it, of which the other Courts will take Notice; for there is a Diversity when such Course is directly against Law, for then it cannot prevail; *vide Pettifer's Case*, 5 Co. And when such Course is not against Law, as by the Course of that Court there goes but one *Sci' fa'*, tho' there be two here; but because the Law does not require two, it is well; and sure to plead a *Clausum fregit* in one County, which is a local Action, to preserve a transitory Action in another County, is a very illegal Course.

Where Course of the Court is against Law it cannot prevail.

Serjeant *Hooper*, for the Defendant in Error, divided it into three Points. 1st, Whether this Course of declaring in any Action or County, upon the Defendant's being brought in upon a general *Clausum fregit*, be erroneous. 2^{dly}, Whether, as this Case is, the Writ lies for Defendant by Journeys Accounts. 3^{dly}, Tho' it should not be good by Journeys Accounts, whether, as it is, it suffice not to preserve the Debt, notwithstanding the Statute.

1st, And he argued, that since there is such a Course in the *C. B.* for a Plaintiff to bring a Defendant in upon a *Clausum fregit*, and then to declare against him in what County, or in what Action he pleased; and alledged on Record that there is such a Usage, and that confessed by Demurrer; now this Court must take Notice of it as the Law of the Court; *vide* 1 Jo. 417. Cro. Car. 526, 527. contrary to *Pettifer's Case*, 5 Co. And the Course of the Court is to be allowed for Law; he quoted 1 Jo. 435. March 59. 2 Co. *Lane's Case*; 4 Co. *Slade's Case*, great Regard to Multitude of Precedents; 2 Co. *Wiscott's Case*. A Common Recovery of Lands in *Wales* is suffered upon a *Quod ei deforceat*, with a *Protestando* to prosecute in the Nature of a Writ of Entry in the Post; and tho' a *Quod ei deforceat* be properly when a particular Tenant loseth by Default, and is grounded upon a Tort, and the other Writ upon a Right; yet will they not reverse such Judgment for Error. 1 Jo. 381. Cro. Car. 444. Upon an *Audita querela* sued out in Chancery, the Party finds Bail, who bind themselves in a Recognizance, that the Plaintiff shall appear & *stabit juri in ea parte*. And in a *Sci' fa'* brought thereupon, the Breach

Course of the Court is Law.

assigned was, that the Party did not pay the Condemnation, or go to Gaol; and tho' that be not mentioned in the Recognizance, yet because the Course of Chancery is to take them in that Manner, the Court will take Notice of it. 2 Cr. 67, 68. And the Case of *Bruerton* cited of the other Side differs from this; for 1st, both the Writ and Declaration were in Case; so that it was plain the Writ appeared to have been designed for the Original in that Action, and therefore variant and void; but here this Writ shewn is a *Clausum fregit*, and the Count is in Case. 2^{dly}, This Usage of the C. B. was not there averred, as 'tis here, and so confessed by the Demurrer; and he relied upon 1 Jo. 312, 313. 1 Cro. 294. The Statute of Limitation was pleaded to a Debt upon an *Assumpsit*, the Plaintiff replied, that at such a Time within the six Years he sued out an Original against the Defendant to the Sheriff of H. and that thereupon the Defendant was outlawed; and that after such a Time the Outlawry was reversed; and that within a Year after he sued the Writ, on which the now Action is founded against the Defendant, into *Suffolk*, and avers them to be for the same Cause; and a Demurrer; and tho' the Court held there had been a Variance between the first and second Action, yet because they were averred to be for the same Cause, and that confessed by the Demurrer, Plaintiff had Judgment. *Vide* 1 Sid. 328. That this is a Course which has now obtain'd in the Common Pleas. *Vide* 2 Vent. 193, 259. But *Note*; There is no Judgment in either Case.

Whether the
Writ be well
by Journeys
Accounts.

2^{dly}, Whether the Writ be well by Journeys Accounts; and he agreed the Opinion in 6 Co. 10. was against him; for there it is said to lie in no Case but between the same Parties, and neither for or against Executor or Administrator; but he said this was no Resolution, for it was no Point in Question in the Case; and tho' *Coke* quotes many Authorities for it, yet none of them does warrant it; but the Reason of the Law, as well as Authorities seem against him. 10 Ed. 3. 490. is there quoted in Point, and there is no such Folio in any Book, new or old, of that King, and all the other Cases concern only the affirmative Part of the Proposition, that where there are more Plaintiffs or Defendants than one, and one of them dies, it lies; and *F. N. B.*

Journeys Ac-
counts will lie
where abates
by Act of God;
aliter where
by Act of the
Party.

32. is against him. 1 Ed. 3. 17. 8 H. 5. 6. In a *Quare impedit* the Defendant died, and a new Writ purchased *per* Journeys Accounts, and the Diversity there taken, where it is abated by the Act of God, and where by the Act of the Party; where it is by the Act of God, it will lie; otherwise where

where it is by the Act of the Party; and sure these are rather against my Lord *Coke* than for him; and the Reason of *Spencer's Case* is also against this Opinion; for there it is held, in Case of any Default in the Clerk, as false *Latin*, Variance, Want of Form, &c. whereby the Writ abates, the Plaintiff shall have a new Writ *per Journeys Accounts*: And so in some Cases even where there is some Default in the Plaintiff; as if it abates for Non-tenure of Parcel, that is when more is demanded than the Tenant holds, or when it abates for Jointenancy with another in the Defendant; for it is hard, says the Book, the Plaintiff should suffer for not taking Notice of what lies not properly in his Conuſance; yet these are Things which by Diligence and Means might be found out; and to say that he should have Journeys Accounts there, where he might possibly prevent his Writ's being abated by finding out the Quantity of the Land in Defendant's Tenure, or the Quality of his Estate, and not where his Writ abates meerly by Death, the irresistible Act of God, would sure be against all Reason. And if this Writ did not lie against the Heir, he might alien before Action brought; and Executors would avoid just Debts, as here. *Br. Quare Imp.* is flat against me, but the Book which he abridges is for me.

3dly, All these Cases were before the Statute of Limitations; and therefore since the Statute has limited the Plaintiff in Time to claim his Right, if a Writ abated by the Act of God would not be capable of reviving, and so brought out of the Statute, it would be extream mischievous; and he quoted the Case of one *Thoroughgood* in the *C. B. Trin. 8 W. 3. Rot. 370.* where an Executor *durante minoritate* brought an *Assumpsit*, and pending it the Infant came of Age, and brought a new Writ *recenter*, to which *Non assumpsit infra sex annos* was pleaded, and this Matter set forth in the Replication, and Judgment for the Plaintiff; and the Statute never meant to bar a Right where there are no Laches in the Plaintiff, as here there are none; where the Action brought in due Time determined by the Act of God. And this is the Reason of the *Proviso* in the Statute of Fines, which indeed is for Caution, and not of Necessity. *Cro. El. 219. 1 Leo. 297. 1 And. 264.* If Infant enters within five Years after a Fine, he shall avoid it for ever. So if he enter before he comes of Age, tho' that be out of the Words of the *Proviso*. So if one be outlawed, within six Years after he reverse it, and then after the six Years a new Writ is brought, the Statute is no Plea. *1 Sid. 228.*

Action

Latitat in
B. R. pre-
vents the Sta-
tute of Limi-
tations.

Action begun in an inferior Court, and removed up by *Habeas Corpus*, you begin upon it here above, and so prevent the Statute. 2 *Inst.* 519. 1 *Sid.* 53. *Latitat* in this Court prevents the Statute of Limitations, but the Continuances must be entered, which may be done by an Attorney in his Chamber; and he concluded, that the Course of one of the Courts of *Westminster Hall* is the greatest Evidence of the Law that can be, and greater than any Book-Case.

Holt Ch. J. You say that it is the Course of the Court 'Time out of Mind; the Question is, whether that must be granted, or, if it be contradicted, how it shall be tried? It cannot be by Jury; therefore alledging or not alledging it is not material; for if it be the Course of the Court, it is Matter of Law, of which we, as Judges, must take Notice. Such a *Way* has obtained, but the Question is, whether such a *Course* has Efficacy enough to be a good Ground for a Declaration? And suppose, when the Defendant comes in and puts in Bail, he demands Oyer of the Original? do you think it will be enough to give him Oyer of the *Clausum fregit*?

Vide 1 Vent.
45.

Journeys Ac-
count must be
between Par-
ties to the first
Writ.

And as to the Journeys Accounts, the Plaintiff's Intestate brings an Action within six Years, and it is proceeded, and pending it Plaintiff dies, and the six Years are elapsed in the *Interim*, it were reasonable that Administrator might have another Action within convenient Time, and have Benefit of the first Action for the Preservation of the Right against the Statute, as the Practice has been in Cases of Outlawry. But if an Heir in Tail bring a *Formedon* within five Years after a Fine levied by a third Person, who is not his Ancestor in Tail, but a Discontinuee for the Purpose, and pending it, and after the five Years, the Issue dies, whether the next Heir in Tail shall have Benefit of this *Formedon*, by bringing a new one in convenient Time? It were reasonable he should, but that has not been determined. And it is plain Journeys Account will not lie in this Case, for the Rule is, that it must be between those that were Parties to the first Writ. And besides, the new Writ is to be the same with the former; and the Writ that lay for the Ancestor, or for the Testator, is not the same that lies for the Issue or Executor, but one of another Nature. If an Assize be brought within twenty Years after a Disseisin, and before Judgment twenty Years pass, and then the Demandant dies, the Heir cannot have another Assize, but he must have a Writ of Entry; and it will be hard to prove the Heir can proceed by Journeys Accounts in that Case; for it is another

ther Writ he is intituled to now by the Death of his Ancestor; yet still he may be out of the Statute of Limitation.

To deliver a Declaration in Ejectment is the Course of this Court; and it was thought by some, that if a Declaration had been delivered within twenty Years, that would tantamount to an Entry; but it is quite otherwise; for tho' a Declaration be delivered within twenty Years, and a Trial, whereby there is Lease, Entry and Ouster confessed; yet that will not amount to an Entry, to bring it out of the Statute of Limitations, tho' an Entry be actually confessed; for it must be an actual Entry, tho' an Ejectment be a customary Way of proceeding. And this has been so adjudged.

Actual Entry must be to prevent Statute of Limitations.

Vide 1 Vent.

42.

1 Saund. 319.

1 Mod. 10.

2 Keb. 555.

And if a Thing be laid by Way of Prescription, which does not lie in Prescription, and it be demurred unto, that does not confess it; for if this be a Course of the Court, it is Law; and if it be Law we are to take Notice of it. If one says that he was seised of a Manor, and that he, and all those whose Estate he has therein, had a Court-Baron, that would be a void Prescription; because a Court-Baron is incident to a Manor of Course; and this is the Reason of *Lane's Case*; and a Lease by the Chequer is a permanent Interest. And suppose the Intestate, after the Action brought, had died within the six Years, so as the Administrator had convenient Time to bring the Action within the six Years, and that he does not do, but brings it after the six Years, that will not help him. So it seems in that Case, not bringing the Action within the six Years would be a *Devastavit*. And tho' in 2 R. 3. 9. b. the Course of the Common Pleas be pleaded, yet that need not be; and it is like laying the Custom of *England* in charging a Carrier or Inn-keeper for Goods neglected or stole from them; which Custom, tho' alledged, yet is not triable, but is the Common Law, of which the Court must take Notice; and if in that Case a Custom were laid, that a Carrier or Inn-keeper ought to keep the Goods as their own, it would be ill; for there is no such Custom; and to plead what one need not plead would be Folly. *Note*; This was in *Trinity Term* last, and the Case being argued again this Term, it was urged for the Plaintiff in Error, by *Broderick*, that the Original in *Dorsetshire* could not preserve this Right; for that a Writ in one County could not maintain a Declaration in another County; and for that were quoted 2 Cro. 654. *Palm.* 492. 2 Rol. Ab. 382. 2 Cro. 664. And a Variance between the Name of a Place in the Writ and Declaration fatal, notwithstanding the Stat. 18 El. c. —. And the true Difference is

If Intestate dies within six Years, and Administrator had Time to bring Action within six Years, and does not, Statute will incur.

Custom alledged, that Carrier shall safely keep Goods, is not triable, for it is the Common Law.

Want of Original is helped by the Statute, a vitious one is not.

between the Want of an Original, for that is help'd by the Statute, and a vitious Original, which is not helped.

Obj. This Writ is only to bring him in, and then Party may declare against him *in Custodia* of Warden of Fleet; and this by Course of the Court, as well as in the King's Bench, one is declared against *in Custodia Marescalli*.

Ans. No Course of a Court can prevail against the expresse Words of an Act of Parliament; and the Words of the Statute are *Except Suit be prosecuted and commenc'd within six Years after the Promise, &c.* and that must be unless something be in Court on which a Judgment can be grounded. By this Practice I may deliver several Declarations upon one Original, and in the same Term, and in several Sorts of Actions, as Debt, Detinue, Case, &c. besides the very Court of Common Pleas have declared it a late Practice, and doubted of the Legality of it. 2 Vent. 259, 194. Then to say they sued it *ea Intentione*, how shall that be tried? or shall it be intended it was purchased to prosecute this individual Action; indeed sometimes upon another Fact put in Issue Jury shall try the Intent collaterally, as in Case of Murder; but that cannot be so here, *Sciens canem ad mordend' oves assuet'* is not traversable. Owen 128. 3 Cro. 738. Issue taken, that one was *expers in legibus* bad, because not triable. 1 Cro. 330. Clerk of the Hamper declared that he sued an Attachment of Privilege out of Chancery *ea Intentione*, that Defendant should put in Bail to answer Debt upon a Bond, and held it would not do, tho' Petit-Bag Side be a Court of Record, of whose Course the other Courts of Westminster ought to take Notice; and it was compared here to the Case in Yelv. 42. 2 Cro. 67. where a Course in Chancery, founded on many Precedents, to take one up by *Capias* on a Recognizance on Petit-Bag Side, was adjudged illegal; which proves that such Course of Courts, as must be taken Notice of by other Courts, must be according to Law. Hob. 270. Precedents of a Court, as well as the Law of a Court, are founded upon Reason, and *tantum habent de lege quantum habent de Justitia*. 5 Ed. 4. 115. Dy. 105. 4 Inst. 86. What is against Law and Statute of the Realm, cannot be made good by Precedents or Prescription.

Sciens is not traversable.

Course of Courts to be taken Notice of, must be according to Law.

Journeys Accounts cannot be but where the first Writ is returned.

As to the bringing this Writ by Journeys Accounts, it is plain it cannot be, for no such Writ can be but where the first Writ is returned; for the Time of its Abatement ought to appear to the Court, that they may thereby see whether the second Writ be sued out in convenient Time. 14 H. 6. 7. 6 Co. 10 b. 9 Ed. 4. 6. If one be nonsuited upon the first,

he

he never shall have another Writ *per Journeys Accounts*. *Fitz. Journ' Acc'* 13. 16 *Hugh. Ab.* 177. It must be purchased in reasonable Time, and fifteen Days was the Time allow'd by Common Law; but if it were a Case where an Attorney might be, there must have been longer Time, because he must give Notice to his Principal of the Abatement of the Writ; and sure if Journeys Accounts would lie here, to bring the new Writ fifteen Months after the Abatement of the first Writ, would be too stale a Prosecution; but the Judges upon Examination of Circumstances are Judges of reasonable Time.

And the Design of the Statute of *Limitation* was to prevent Perjury, which was frequently committed by suffering Parol Evidence of Agreement after six Years. *Ray.* 417.

107.

Pratt, Serjeant, *contra*: 1st, It appears the Original *Quare clausum fregit* was taken out within the six Years. 2^{dly}, That it was *eo Intentione* to declare in this Action, for that is confess'd by the Demurrer; so the Question first will be whether the Defendant might be brought into Court by a *Clausum fregit*, and declared against in another Action. We do not pretend to prove that an Original in Trespass will maintain a Declaration in Case, but that when a Defendant has appeared in Trespass, we may declare against him in in Case; and the only Use we would make of the Original in Trespass, is to bring him into Court, and then file a new Original against him, on which we would declare; and if this Course be for the Ease and Advancement of Justice, it cannot be against Reason or Law, for Justice ought to be had with Ease. And to put a poor Plaintiff to the Charge of a special Original, before he is sure of getting a Defendant to appear, would be a Hardship upon him, and therefore a Difficulty of Justice: And that such Course is not against any Rule of Law, appears from the like Course's being allow'd in this Court, where one is brought in by a *Latitat*, which in 1 Vent. 28. Strictness is not in the Nature of an Original to the Action, but the Declaration is it; and there is no doubt of the Legality of such Proceedings here. And if this Course in the Common Pleas be grounded upon the like Reason and Conveniency, why should it be question'd?

Now, whether there be such a Course in the Common Pleas, if there be Occasion, will be certified by the Judges of that Court, who are to be presumed to be best conversant of their own Customs; and by their Judgment in this Case they have shew'd there is such a Custom. Nor is it
ne-

necessary this Course should be according to the general Rule of the Common Law; for it is said in the Cases that treat of the Courses of Courts, that the Judges ought to take judicial Knowledge of such Courses, which would be an absurd Saying if they were according to the Common Law; for it were to tell them they must take Notice of the Common Law; nay such Course may be contrary to the Common Law, as *Lane's Case*, 2 Co. is: For it is a known Rule of the Common Law, that no Land can be convey'd to or from the King, but under the Great Seal; yet there it is held that Crown Land may be granted under Chequer Seal, by the Course of that Court; and that by the Word *Committimus*, a Term not known to have any such Force by the general Rules of the Common Law. And the Reason given for that Judgment will hold in our Case, *viz.* the great Inconveniency that would ensue by defeating the Interest of many Farmers. And here many Judgments there be in the Common Pleas grounded upon this Course, which may all be reversed as well as this now in Question; and for avoiding of such Inconveniency, many Precedents not maintainable in Strictness of Law are allow'd, lest the Property of the Subject should be made precarious.

And as to the Journeys Accounts, an Action brought within due Time abates by the Act of God, *viz.* Death of Party; and another is brought, which tho' in Strictness it cannot be called the same Action, because it is not between the same Parties, yet in Consideration of Law may be well said *quodammodo* between the same Parties, and the very Case where Journeys Accounts is allowable; where a Writ abates by the Act of God, tho' it be between the same Parties, yet it cannot in Strictness be called the same Action, for the first Action is abated. If the first Writ abate thro' the Fault of the Plaintiff, there shall not be a new one by Journeys Accounts; but there shall where it abates by Fault of the Clerk. And tho' it be said in 6 Co. — that it lies not for Heir or Executor, because not Party to the first Writ; yet sure that Opinion is not to be maintained by Reason, to say, that when a Writ abates by the Fault of Clerk he shall have a new Writ, and not when it abates by the Act of God. And the Law, which is *summa ratio*, shall never punish one with the Loss of his Right, when there is no Default in him, especially since the Writ of Journeys Account is grounded upon natural Reason, and not upon any positive Law; and tho' the Party himself be dead, yet his Right survives to his Administrator. If a Man bind him-

self and his Heir by Bond, and dies, leaving Land in Fee to the Heir; Obligor takes out a Writ and then dies, and after the Heir aliens, it would be hard if the Executor shall not revive this Writ, and bind the Land. And it were absurd to say the Common Law should be without Remedy against these Inconveniencies.

Here is but my Lord *Coke's* single Opinion against us; since it is attended with such Inconveniencies, it well becomes this Court to correct it; and *Coke* does not report it as the Opinion of the Court, for the Writ in his Case was brought by the same Demandant that brought the first Writ; so there was no Question of this Point, and the Authorities cited do not at all warrant this Opinion. And 9 *Ed.* 3. 16. is against him; for there a Writ was maintained, after great Debate, by a Successor of a Prior by Journeys Accounts, and it was not as much as objected that they were not the same Parties. And many Authorities are quoted by my Lord *Coke*, where the first Writ was by several Plaintiffs, or against several Defendants; and a new Writ brought by Journeys Accounts, and yet they are not the same Parties, for some are dead.

Obj. Clausum fregit in its Nature cannot be continued against an Executor; but I answer, That since the only Use we would make of it, is to bring the Defendant in to answer, it will be favour'd to hinder the Statute from running upon us, to the Destruction of a just Debt.

And the Design of the Statute was to suppress old Rights, where the Party did not prosecute his Right in convenient Time, which was fix'd to six Years, and not to extinguish a Right where there was no Default in the Plaintiff; and that this was the Intent of the Statute, appears from the Proviso for the saving the Rights of Infants, Persons beyond Sea, &c. in whom there could be no Laches, because of their Disability; and here we shew ourselves under as great a Disability; we are intitled to the Benefit of the Proviso. If a Man bring an Action in an inferiour Court within the six Years, and after the six Years it is by *Hab. Corp.* removed hither, there must be new Bail and a new Declaration here above; so in Strictness here is a new Proceeding here above, yet the commencing below prevents the Statute's being pleaded to the Declaration *de novo* above. 1 *Sid.* 238. If a new Promise be made within six Years, the Action and Right is thereby saved, tho' the original Contract be long before, which is the Ground of the Suit; so if the Defendant do but own the Debt within six Years, it is Evidence

of a new Promise. So in all the Cases, which are not within the Mischief of the Statute, the Judges have made a favourable Construction in Aid of Creditors.

Demurrer
confesses no-
thing but what
is materially
alleged.

Broderick replied, That a Demurrer could confess nothing but what was materially alleged; and it cannot be averr'd that *ea Intentione*, &c. the Writ was purchased. And as to *Coke's* Opinion concerning Journeys Accounts, he quoted further *Br. Journ. Acc.* 23. *Quar' Imp.* 150. *F.N.B.* 32. c. — And at Common Law a *Clausum fregit* did not lie against an Executor, but is given by the Statute of — *Ed.* 3. — and they would have a Process by Act of Parliament continued by Common Law; and in the Case of the *Hab. Corp.* the Bail below are not discharged till new Bail be put in here.

The Practice
of every Court
must be taken
Notice of.

Holt, C. J. We are bound *ex officio* to take Notice of the Practice of every Court in *Westminster Hall*, let us be inform'd which way we can; the Rule of a Court is one Thing, and an establish'd Practice, of which one shall have Avail without pleading, is another Thing; and it is not the Judges of that Court's saying, that it is the Course of the Court will determine it.

Suppose you had pleaded a Right, and a proper Original in this Manner that you have done here, you have not shewed that it ever was return'd, and till Return there is no Day in Court; and there is no Continuance shewn to have been enter'd; and to prevent the Statute it is not enough to take out a Writ, even a proper one, but all the Continuances, tho' for six or seven Years, must be enter'd, and so shewn to the Court; for if there be but an Omission of one Continuance, it spoils all. Indeed where one pleads in Abatement another Action depending *ex eadem Causa*, he need not plead all the Continuances, but yet he must shew the Action is not determined. But *per luy*, In this Case it is not enough to say it was continued, but it must be shewn how; but *Gould* thought it would be well only to allege a Continuance generally; but agreed, that if a Continuance be not alleged, it shall be intended a Discontinuance, for it is so of Course; and for that Cause the Judgment was reversed, but the Court would deliver no positive Opinion upon the other Points. But *Holt* with some Vehemence ask'd *Prat* how an Original in *D.* could be a Foundation for a Declaration in *London*? and said a Journeys Account was a Common Law Writ; and tho' a Journeys Account properly did not lie here, being not between the same Parties: And it were hard not to allow a Revivor of the first Writ now in such Cases as this, and that by Consequence of Law upon

upon the Statute of Limitation; but for the Discontinuance only was Judgment reversed.

King versus Daws.

THE Defendant being Sheriff, and having taken up a Man upon an Attachment, took a Bail-Bond from a sufficient Bail for his Appearance. It was moved by *Raymond* that the Prosecutor should be compell'd to take an Assignment of the Bail-Bond; and this he said was frequently granted in the Common Pleas, where Obligee was a sufficient Person: But Court denied the Motion.

Moved by Sheriff to oblige a Person to take Assignment of a Bail-Bond.
Ante p. 447.

Note: A Copy of a Charter under the Great Seal cannot be given in Evidence, but a Copy of the Record thereof may.

Copy of Charter under the Great Seal no Evidence.

Plaintiff proceeded against the Principal and Bail, and the Principal order'd an Attorney to appear for them both; and tho' the Bail complain'd against this, yet the Court would not relieve him, but bid him proceed against the Principal, especially the Attorney, being able to answer Damages.

Court never changes *Venue* in Debt.

Venue not changed in Debt.

Cudmore versus Ellis.

Statute of Limitation is not pleadable where there was a Current Account, but if it were a Stated Account above six Years ago, it is pleadable to it; in Account common Bail suffices. And *per Holt*, when upon Contest about common or special Bail, it does appear that the Plaintiff has misconceived his Action, and that if any Action lies, it is of another Sort; there common Bail ought to be accepted.

Statute of Limitations not pleadable to a Current Account.

Jonson versus Meers.

IN this Case it was resolved, where a *Scilicet* comes, and the Matter had been well without alledging what comes after the *Scilicet*; there if what comes after it be repugnant to what comes before, it shall be rejected. As here an Agreement

What comes after a *Scilicet*, if repugnant, may be rejected.

greement was between the Plaintiff and Defendant, that the Defendant should send him so much of the best Indigo by the first Ship that should come within two Months after his Arrival at *Jamaica*; and in alledging Breach, it was laid that such a Ship came from thence within two Months, *scilicet* such a Day, which Day is after the two Months; there what comes after the *Scilicet*, being unnecessary, and also repugnant, it shall be rejected. So in Ejectment, if one declares of a Lease made such a Day, and that *postea, scilicet* such a Day, which in Truth is before the Day mention'd in the Lease. 2dly, That *Price* and Market Price of a Thing is the same; for that is the Price of any Thing for which it can be sold.

Warner versus Green.

Excommuni-
cation pleaded
in Abatement,
must only be
quousque.

EXcommunication in Plaintiff was pleaded in Abatement, with Conclusion of *petit Judicium, &c. et quod Defendens eat inde sine die* absolutely; and *Respondeas ouster* awarded for two Reasons; 1st, For the Conclusion ought to be *sine die quousque* Plaintiff were absolved; for upon Absolution he should have a Re-summons. 2dly, For not having a Certificate of the Excommunication. *Vide Litt. 5, 201. 9 Co. 41. 8 Co. 62, 67. 2 Cro. 82.*

Chancey versus Win & al.

Salk. 628.
*De injuria sua
propria* a good
Replication to
a Justification
under a Sta-
tute.

IN Trespas against three, for taking so many Bushels of Salt. The Defendants justified as Commissioners appointed according to the Statute of 10 W. 3. c. — prohibiting the Exportation of any Rock or White Salt, without first weighing the same before the Commissioners; and the Salt in Question was put on board a Hoy, &c. *fore deliberand'* into such a Ship *in Hibern' exportand'*; Plaintiff reply'd *de injuria sua propria absque tali Causa*. And Ward objected, this general Traverse was ill according to the Rules of *Crogate's Case*, 8 Co. 67. for one of the Rules there is, that where the Defendant claims an Interest in the Thing, or where he justifies as Servant to another; there a general Traverse of *absque tali causa* is not good: For when the Defendant claims a Right, the Plaintiff cannot aver that he is a Wrongdoer without traversing the Right; but where the Defendant claims no Right, but only pleads Matter of Excuse, with-

out

out which he would be plainly a Wrong-doer; there it suffices for the Plaintiff to maintain the Wrong; and in such Case *de injuriâ suâ propriâ absque tali causâ* generally is a good Replication. The second Rule there is, that it cannot be when a Matter of Record is pleaded, for that were to put Matter of Fact and of Record in Issue. 3dly, It is not good when Defendant justifies by Authority in Law, for that were to involve Multiplicity of Facts in one Issue, when every Issue ought to be single and particular. And our Case is within all these Rules. 1st, Two of the Defendants justify as Servants to the third, and so in his Right, and as his Servants. And 2dly, the other justifies as Servant to the Commissioners of Excise, and by an Authority derived from them. 3dly, This is a Justification under an Act of Parliament, which is an Authority in Law. And for these Rules he further quoted 1 Ro. Rep. 47. Hill. 6 W. 3. rot. 1819. 2 Keb. 266. Cro. El. 539. 2 Ro. Ab. 694. and also the Proviso in the Statute of 23 H. 8. c. — of Sewers; where one upon Not guilty may give Warrant of Commissioners of Sewers in Evidence; and Proviso is, that the Plaintiff may give Evidence of *de injuriâ suâ propriâ*.

Eyres contra: 1st, He agreed the general Rule, that when the Plea consists of a Justification, Part depending of Matter of Record, the Replication ought to be with a special Traverse; but that Rule has its Exceptions, for if Matter of Record be made use of by way of Inducement to the Part of Justification, there it is not necessary to reply specially. 2 Leo. 102. And that the Act of Parliament here was mention'd by way of Inducement appears, for if it had not been at all mention'd, the Plea had been as well; for being a general Law, the Court would have taken Notice of it. And here the Act is not left to the Consideration of the Jury, nor is it involv'd in the Issue; and the sole Reason why such a general Replication is naught is, that the *Lay gens* should not be inveigled by having Matter of Record involv'd in the Issue. And here the Issue is not pregnant with any Matter of Law, as whether there be such an Act of Parliament; but the sole Question is, whether the Salt were weighed or not? 2dly, That general Rule only holds Place where such Matter of Record is pleaded, to which the Plaintiff may have an Answer; as to a *Sci. Fa. &c.* but here there can be no Answer to the Act of Parliament.

And he agreed, That where one claims Common by Prescription, Rent by Grant, Goods by Sale, &c. and so justifies, as having *Interest*; there the Plaintiff must answer

Vide 2 Saund;

294, 295.

1 Lev. 307.

directly to the Title, and not with a general *De injuriâ suâ propriâ absque tali causâ*; but when one intitles himself by Act of Parliament, especially a general Act, which none can traverse, there he may well reply *de injuriâ suâ propriâ absque tali causâ*.

And as to the Rule, that where one justifies by Virtue of an Authority in Law, *De injuriâ suâ propriâ absque tali causâ*, he said the Authorities cited there did not warrant it, and denied it to be Law; and the Case that most seems to favour that Opinion is that in — *Ed. 4. —*. where the Defendant justified the Entering to see Waste; but there was a Statute Merchant pleaded in that Case, which is Matter of Record; and also *Littleton* gives another Reason why the Plea was bad, *viz.* the traversing the Intent of seeing Waste, which was not traversable; but he quoted 16 *H. 7. 2.* where one justified by Process of *Withernam*, and the general Traverse of *Absque tali causâ* was good. And he said the third Resolution in *Crogate's Case* did contradict the first; *vide 2 Rel. Ab. 694.* Defendant justified cutting of Leather, as a Searcher appointed by an Act of Parliament. *Ray. 50. Co. Ent. 643.* A Justification under the Stat. *De Malefactoribus in parcis*, and *De injuriâ suâ propriâ absque tali causâ* replied.

Vide Yelv.

157.

2 Cro. 224,

598, 599.

2 Saund. 294,
295.

Holt: If in Trespass against a Constable he justifies, for that he was a Constable, and the Plaintiff was breaking the Peace, for which he committed him; may not the Plaintiff reply, *De injuriâ suâ propriâ absque tali causâ*? So if one comes into my House, by my Consent, and he will not go away when I would have him go, I may by Authority in Law turn him out; if he brings Trespass for this, and I set out all the Matter specially in my Justification, *De injuriâ suâ propriâ* generally will be a good Plea; and the Case of entering to see Waste is upon a special Reason; for suppose the Plaintiff were seised in Fee, the Pleading *De injuriâ suâ propriâ* would involve the Seisin in Fee in the Issue, which would be hard to have the Right of the Fee tried in an Issue in Trespass. If the Plaintiff were Lessee, the Lessor might lawfully enter to see Waste; and there to make him a Trespasser the Lessee ought to shew some Misbehaviour in him, as cutting a Tree, destroying the Corn, or staying on the Land all Night, &c. And there is such a Precedent in the Entries, as you say, of the Statute of *Malefactoribus*; but when one justifies by Virtue of a Warrant of a Justice of Peace, it is quite another Thing, because perhaps it may not be proper to involve the Warrant in the Issue.

Issue. And the Act of Parliament here, if it had not been pleaded, would have been taken Notice of by the Court; therefore its being pleaded being superfluous, will be no Hindrance to the Replication, with this general Traverse.

Prohibition was granted to stay a Suit in the Spiritual Court for a Salary of Parish Clerk.

Prohibition to
Suit for a Sa-
lary of a Pa-
rish Clerk.

Trewanion, an antient decayed Gentleman at the Bar, having brought false Imprisonment against an Attorney of the Court, moved to have an Attorney assigned him, for none would voluntarily appear for him; and the Court appointed one at his own Nomination.

An Attorney
appointed by
the Court to
appear for a
Person.

An Indictment of Forgery was found against one of the Officers of the Custom-house; and a Rule of Court was moved for to have the Books of the Office brought to Court to be given in Evidence at the Trial. *Per Cur*: It cannot be done according to Law.

Court will not
order Books
to be produ-
ced at a Trial.

Watson versus Sutton, Marshal of the Court.

DEB'T against the Marshal for an Escape; at the Trial a *Reddedit se* in Discharge of his Bail, and a *Committitur* in Execution to the Marshal, was produced in Evidence; and after Verdict it was moved, that it should be set aside, for the *Committitur* was irregular; for the Course of the Court is, that when any one upon a Render is charged in Execution, there ought to be Notice thereof to the Marshal, without which it were hard to charge him with Escape; and the Course of giving such Notice is by making an Entry of the *Committitur* in a Book kept for that Purpose by the Marshal in the Office of King's Bench; and the Marshal has an Officer on Purpose in the Office to take Notice of such Entries; and it is not enough that the *Committitur* be entered with Mr. *Bromfield* the entring Clerk. And that was agreed by all the Clerks to be the Course.

On a *Redd. die*
se before a
Judge the Bail
is discharged;
but the Mar-
shal not
chargeable
for Escape till
Notice of the
Committitur.

Holt C. J. Upon the *Reddedit se* the Bail are discharged, even upon the *Reddedit se* before a Judge; but the Principal thereupon is not in Execution, till the Plaintiff has made his Election to have him in Execution; and upon such Election there is a *Committitur* entered in the Book in the Office, and the Entry must mention it to be at the Request of the Plaintiff; and all this is supposed to be in Court, and the

Ante p. 567.

No new Trial to be granted where there was full Defence, and except for Matter discovered after the Trial.

Where a Man has Matter of Defence, and knowing of it goes to Trial, in Respect of that shall not have new Trial.

the *Committitur* is filed with Mr. *Bromfield*. And he allowed two Ways of giving the Marshal Notice, the one to make an Entry in his aforesaid Book, the other to carry a Rule to him from the proper Officer; so he agreed it was essential there should be some Way of giving the Marshal Notice. But since this is an Irregularity, whereof the Defendant might have taken Notice before Trial, upon Motion, and that he has slipt that Opportunity, and put the Plaintiff to the Charge of bringing his Action and trying it, it is hard to relieve the Defendant; and the *Committitur* being now recorded implies Notice necessarily; for it is impossible one should be committed to the Custody of another, and he know nothing of it. And as a Man can have no *Audita querela* of a Matter which he had an Opportunity of taking Advantage of before, and had omitted; so here. Indeed if there were Judgment against the Marshal for the Escape of one in Execution upon an erroneous Judgment, which is reversed for Error, there would be Reason to relieve him upon an *Audita querela*, upon the special Matter. But here, tho' it was allowed the Marshal was not chargeable without a legal *Committitur*, which is not compleat till Notice, and that in such Manner as the settled Course of the Court is, *viz.* by Entry in his Book in the Office, which is now to be taken for Law; yet as this Case stood it was held he came too late for Relief. And *Gould* said no Case could be instanced, where a Verdict was set aside, where there had been a Defence and full Evidence, except it were for Matter discovered after the Trial, which this was not; and Motion was denied; tho' it was agreed, that upon a *Reddidit se* of the Principal, the Bail has performed the Recognizance, without any Notice to the Plaintiff; for *Holt* said, to set aside this Verdict were to take two Steps at once. 1st, To set aside the Evidence, which was good and conclusive, and then the Trial. And that ought not to be, no more than, if Debt be brought upon a Judgment irregularly obtained, you can set aside the Judgment and Action at once. And *Gould* laid it down for a Rule, that where a Man has Matter of Defence, and knowing thereof goes to Trial, and puts the Plaintiff to the Charge of proving his Issue, he shall never after, in Respect of that Matter, have a new Trial. And the Rule of keeping the Book for Entries in the Office was held a good Course.

Dominus Rex versus Bowers.

TO stand in the Pillory, or on the Pillory, is the same Pillory. Thing in Judgment, and both signify to stand in the Pillory. *Per Holt.*

Lee versus Elkins. In Communi Banco.

UPON an Award these Points were agreed by the Court. 1st, That an Award, that one of the Parties should do a Thing out of his Power, as to deliver up a Deed which is in the Custody of J. S. is void. 2^{dly}, Where the Matters awarded are distinct, and not the one depending on the other; there the Award may be good as to one Part, and void against the other. *Dy. 217. Cro. Jac. 577. Br. Award 65.* That in that Case the Breach must be assign'd in that Part that is good. *Cro. Jac. Ormlad v. Coke*; Award of a collateral Thing in Satisfaction of Trespass, good. *Cro. Car. 216.* If Arbitration exceed the Time of Submission, yet no Cause shall be presumed to have arisen out of the Time, if it be not shewn: Where the Submission is simply without Condition, Award of Part is good. 8 Co. 97. If Award be for Payment of Money at or before such a Day, it is no Breach to say that it was not paid at the Day, but at or before.

Award to do a Thing out of a Person's Power is void. Award of distinct Things may be good, and void in Part.

If Arbitration exceed Time of Submission, nothing shall be supposed to have intervened.

But another Day the Judges put the Case at large, and delivered their Opinions *seriatim* in it. Debt upon an Award Bond; upon *Nullum fecer' arbit'* an Award was set forth, reciting several Differences between the Parties concerning a Parcel of Land sold by the Defendant to the Plaintiff; and that Parcel thereof was recovered by a Stranger by a prior Title from the Plaintiff; and that the Plaintiff was out of Pocket in Defence thereof, &c. and then all these Controversies were submitted to them on such a Day, *viz.* the Day of the Date of the Bond; and then they Award, that the Defendant should deliver to the Plaintiff a certain Deed concerning the Title of the said Land, or pay the Plaintiff 50*l.* in case of Failer; that he should pay him 12*l.* for his Costs in defending the Suit concerning the Land recovered; and also 11*l.* for his Damage by the said Recovery; and that thereupon the Plaintiff shall give the Defendant a general Release to and upon the Day of the Date of the

Arbitration Bond; and Breach is alledged in Non-payment of the said 11 *l.* and Demurrer.

One Exception to this Award was, that it ordered the Delivery of a Deed which was in the Power of a third Person, and therefore as to that void; and the Plaintiff was not to release till upon Performance of all the Particulars to be done by the Defendant, and one of them being void and impossible was never to be done, therefore the Release was never to be given; *Ergo* the whole Award was *ex parte*.

Blinco J. The Award is good, for it does not positively order the Delivering up of the Deed, but that the Defendant shall do that, or pay 50 *l.*

2. Exception is, that the Release awarded to be made of all Matters, &c. to or upon the Date of the Award Bond, would release the very Award Bond, and therefore a void Release. And he held the Award good; for let the Release awarded be void, and even let the first Matter awarded be likewise void; yet here will be sufficient in the Award to make it good; for here is 12 *l.* awarded for Costs in defending the Title; and in Action for the same Costs this Award will be a good Plea. And again, here are 11 *l.* awarded to be paid for the Plaintiff's Damage; and if he is to pay it for the Damage, the Plaintiff is to receive it so, and sure that is mutual; and the Breach being assigned in that which is well awarded, Plaintiff ought to recover.

If the Day of Performance appears on the Record, in averring Performance, or assigning Breach, it may be referred to by a *Prædict.*

Powell acc. 1st, It is excepted, that in assigning the Breach it is not alledged that on or before the Day mentioned in the Condition of the Bond the Defendant did not pay the said 11 *l.* and he agreed that had been the neatest Way; but here he held it well enough, as it was laid, *viz.* that the Defendant did not pay it *juxta tenorem & effectum* of the Award. And the Rule is, that where the Day of Payment or Performance appears before on the Record, there, in averring Performance, or assigning Breach for the Want of it, you need not mention the Day certainly, but may refer it by a *præd* to the Record; for *id certum est quod referendo fit certum*. But if Award be for Payment of Money, &c. at one or more Days in a certain Indenture mentioned, there to assign Breach in Non-payment, or to alledge Payment at the Day, &c. in the said Indenture mentioned, would be ill; but the Way there is to set forth the Indenture, that so the Day might appear on Record, and then refer to it. *Vide 1 Vent. 87. 3 Cro. 281.* Debt upon Bond for Payment of Money at two several Days and Places; after Defendant pleads

Payment

Payment *secundum formam & effectum conditionis*; and adjudged good, *reddendo singula singulis*.

2. Exception, the Release awarded exceeds the Submission, for it extends to the Bond of Submission. Let it be supposed void for that Reason, yet the Award will be mutual throughout; *ergo* good. It has been often resolved, that if an Award be void in Part, as being only *ex parte*; yet if it be mutual for another Part, it shall be good for that Part; and *vide Osborn's Case* in 10 Co. 131. b. where it is held, that if Award be of some Matter within the Submission, and for that void, as to that Part; and tho' it appears by the Award, that it designed both Matters should be Recompence of what is to be done of the other Side; yet if there be ever so small a Matter to make it mutual, it shall stand for the Matter within the Submission; but *per luy, durus est hic sermo*; and that Judgment was after reversed upon Writ of Error. 1 Leo. 170. And the Rule there put will not hold of the Extent which *Coke* gives it. One recovered 90*l.* Damages in Waste, and then the Matter is submitted to Reference; and it is awarded, that the Defendant should at one Time pay 10*l.* to the Plaintiff, and that at another Day he should pay him 15 *l.* and that for Payment another and the Defendant should become bound in a Bond; this being good in Part, tho' void for the rest, was held good; but sure that was hard, and would not pass at this Day.

Vide Hard. 399. A Difference is taken where the Thing to be done on one Side is only applied to one particular Thing of the other Side; there, tho' the Award be void in other Parts, it may be good in that Part; *secus* where a particular Thing of one Side is applied by the Award to all that is to be done of the other Side, if any of those Things be ill awarded, the Award cannot be good for the rest: If an Award were, that one of the Parties with his Wife and Son join in a Conveyance to the other, and the other pay him 100*l.* that Award is good, as to a Conveyance to be made by himself; and if that only had been awarded for the 100*l.* it had been well; but sure such Award would be wholly void; for the other was to have had a Title made to him from the Party, his Wife and Son. And it would be unreasonable, if it were that one should be obliged to pay his Money, and not have such Title made to him as the Arbitrators designed; and if this Award had been only mutual in this Point in which the Breach is assigned, and not throughout the whole Matter in Difference, it would be void without Doubt.

The Award be void in Part, yet if it be mutual for an other Part, it is good for that.

Vide ante 129. Where a particular Thing is to be done on one Side, as a Condition of doing several on the other, if any are ill awarded, it is ill *in toto*.

1*st*, Here

1st, Here the Defendant is to deliver the Plaintiff his Writing relating to the Land sold to him by the Defendant, or else 50*l.* Damages; and this is a Bar to an Action of Detinue for these Writings; and the Award imitates a Verdict in Detinue, and Judgment and Execution thereupon, which would be in this Manner, for the Thing it self, if it could be; *secus* for Damages. 2. Thing is of so much for Costs, which is a good Discharge of those Costs; and therefore mutual; so is the 11 *l.* for Damages for the Recovery. So the Award is mutual throughout, and the Release nothing to the Purpose. And he compared it to an Award of 40 *l.* for all Trespasses, and that the Plaintiff should release all Damages to Time of Award, which Award of Release would be void, and yet the Award would be good. *Vide Cro. El. 89. Jac. 447. 1 Rob. Ab. 260. Allen 85.* That ordering of all Suits to cease between the Parties makes the Award mutual.

And as to the Awarding the Releases, the one, besides what before is said, is ordered to execute a Release to the other to and upon the Day of Arbitration Bond; and *super performance* *inde* the other is to release to him in like Manner; so that the one is not ordered to release till all the Matter to be done, or awarded to be done of the other Side, be performed. And tho' the Awarding such a Release were void, yet, if the giving thereof be ordered to be before the other does release, it is a Condition precedent, which ought to be before the Release is to be made by the other; and that is one of the Points resolved in *More* and *Bigle's Case*.

Where a void Thing is awarded to be done, on the Performance of which another Thing is to be done, it is a Condition precedent, and must be averred.

Where several Things are awarded, and on Performance *præmissorum* the other is to release; Averment of Performance of what is well

But *per Luy*: This Diversity is to be observed; where an Award consists of divers Things, and one of them is void, and it be expressly said, that upon Performance of that void Thing the other Party shall do such a Thing, there the doing of the void Thing is a Condition precedent, and must be averred, before Action against the other for not doing his Part. But where there be several Things in an Award, and some are good, and others not, and it is further said, that upon Performance *Præmissorum* the other shall release for the Purpose, there it suffices to make Averment of Performance of what is well awarded, without more. *Vide 2 Keb. 759, 833.* So here, there being several Matters awarded, the *Super performance inde* shall only go to that Part of the Award which is good; and Performance of so much obliges the other to do what belongs to him. Suppose Award be, that both Parties shall make mutual Releases to one another

2

awarded is sufficient. *Vide 2 Lev. 3. acc. Ibid. 6.*

other to the Time of the Award, and that *A.* upon *B.*'s making him such Release, should release to *B.* *B.* tenders a Release to *A.* to the Time of the Submission, it would be a good Tender; so it would be here. 1 *Rol. Ab.* 260. 1 *Sid.* 265. *per Windam. Hutt.* 29. *cont'* to *Rol.* 244.

Release to the Time of Submission is Performance of Award of Release to the Time of Award.

Besides, this Release would not discharge the Bond, notwithstanding the Words reach to it; for the Award is *De & super præmissis*. *Vide Allen* 51, 52. the Consequence of these Words in an Award. And tho' these Words have but of late been introduced into Pleading, yet it is to very good Purpose to put them in; for thereby the general Words of an Award are applied only to the Matter submitted. And if Award be to pay Money at a Day to come, and the other shall give a Release *De præmissis*, it shall only be a Release of things before the Submission. So here, the Release of Matters to and upon the Day of Submission, shall be intended of Matters on that Day before the Submission.

Nevill agreed the Plaintiff ought to have Judgment, but doubted if the Award were good throughout, and cited *Hob.* 109. *contra* to *Rol. Ab.* 254.

Trevor C. J. I am not satisfied that that Part of the Award which relates to Release is good; but hold the Award good as to the rest. 1st, This is a Release to be given by the Defendant to the Plaintiff at a Day after the Submission of all Matters, &c. to or upon such a Day, which is the Date of the Arbitration Bond; and thereupon the like Release is to be given by the Plaintiff to the Defendant. Now I think the Awarding the first Release is void, for it takes in the Arbitration Bond expressly as can be. Tho' I agree with Brother *Powell*, *De & super præmissis* is of good Use in a general Matter, where there is Room for extensive Construction, to restrain it to Matters submitted; but where Words are very plain and full, I deny that *De & super præmissis* will do the Business. As if Award be, that one Party shall on such a Day give a general Release to the other, there *De & super præmissis* will make it interpretable to be a Release only to the Submission, tho' to be made long after; for tho' it be given now, it may only be of Matters long before; and in that Generality of Words it shall be intended a Release of such Things as the Parties that ordered it had Power to order a Release in. But here they expressly shew how far the Release shall work, *viz.* to and upon the Day of Submission; and to construe this otherwise than they have expressly declared it, will be very odd. And sure to construe a Tender of a Release to Time of Submission

Per Trevor, Award of a general Release shall not extend further than to the Time of Submission; but if Award by express Words to the Time of Award, it shall be so.

sion to be good, where the Arbitrators have ordered a Release to the Time of the Award, would be to make an Award, and not declare the Law upon it; and then farewell all Awards. And it is in *Hutt.* 447. That Awarding a Release to Time of Award is void; which could not be, if it could be made good to the Time of Submission. 1 *Ro. Ab.* 242. 1 *Ro. Rep.* 1, 2. So as to that Point I differ with my Brother *Powel*. And the present Case goes not so far as that before put, for this is not to the Time of the Award, but only to and upon Submission Day; and the Law will make no Fractions of a Day, and the Submission being of all Matters on that Day, the Release is likewise so: So that if that were the Question, I could not give my Opinion for the making it good as far as it goes upon the Release.

Now as to the Release order'd to be given by the Plaintiff to the Defendant, that cannot be ill awarded upon the same Reason that I hold the other ill, *viz.* that it would release the Award Bond; for that Release by the Award is the last Thing to be done, and then it is no Matter tho' it should release the Bond, the Conditions whereof would be compleatly perform'd by the giving of it. But I hold it will not be good upon another Reason, because it is to be given upon the Defendant's performing all the Parts of the Award of his Side; so that is the Consideration of it, which is a Matter precedent, and therefore ought to be first performed: So if any Thing that is awarded to be done by the Defendant be void, it ought not to be done; and till it be done, this Release is not to be made; *ergo* never to be made. So I do agree with my Brother *Powel* in Part, *viz.* that if Part of the Award be void, yet if it be a Condition precedent, it must be perform'd before the other performs of his Side; but my Brother's Diversity of express Words of Reference I think will not hold, that is, that where the Words be express, that upon Performance of that Part which is void, the other shall do such a Thing, there the void Thing, says he, is a Condition precedent, and must be done; but where several Things are order'd, and some of them void, and that *super performanceem præm'* such a Thing shall be done; there he says it, is enough to do that which is well awarded, to be intitled to the Thing to be done of the other Side: I say that every illegal Part of an Award is the same Thing to many Purposes, as if it were not in; but yet if it appear that the Arbitrators design'd that

2 Lev. 3.
If it appear
that a void
Part of Award
was intended

as a Consideration of a Thing's being done on the other Side, it must be done.

such illegal Part should be Part of the Consideration, in respect of which the other was to perform, it must be done, or else here is not that Advantage for the other Side, which was design'd for it; and he has a Wrong done him by being forced to pay for a Consideration which he has not.

Then here is a Submission of all Matters in Difference; and here is Mention made of such Causes of Demand the Plaintiff has against the Defendant, and such and such Matters order'd to be done by him in Discharge of them; and Accord with Satisfaction would be a good Plea in Actions for them, therefore this Award will. *Jud' pro Quer'.*

Simson versus Barlow.

IN Case Plaintiff declared, that he was of and used the Trade of a Millener, and was of Good Credit and Reputation; and that the Defendant with Intent, &c. said these Words to him, *Thou art a beggarly Fellow, and not worth a Farthing*; and laid, that by reason of these Words *A.* his former Customer left him, and that the Defendant *ex ultiori malitiâ* said of him, *You are not worth a Farthing*, Verdict and entire Damages. And it was moved in Arrest of Judgment, that the Damages being entire, it must be intended they were assess'd for both the Words, and that the second Words were not actionable, tho' the first were, in respect of the special Damage; therefore there could be no Judgment. *Cur'*: It is true, if the second Words be not actionable, tho' the first be, yet since Damages are intire, there ought to be no Judgment: But we hold both Words are in themselves actionable in this Case, for they both prejudice the Plaintiff in his Credit, he being a Tradesman, and by Consequence living by his Credit; and this being a Trade well known, of which Credit is a great Support. The Authorities are many as to the first Words; 1 *Jo.* 321. 1 *Cro.* 317. said of a *Hamborough* Merchant, *He came a broken Merchant from Hamborough*, which Words are not so strong by a great deal, as those now in Question; for tho' they did not import that he was a broken Merchant at that Time, but had been so some ten Years before, as appeared by the Declaration; and he might be a good Man at the Time of speaking the Words, yet they were adjudged actionable. *Hutt.* 125. Action maintained by a Fuller for these Words; *Trust him not, he owes me 100 l. and is not worth a Groat*; and because he was a Tradesman, and that the Words did tend to his

Words.
To say to a
Millener, *Thou
art a beggarly
Fellow, and
not worth a
Farthing*, are
actionable
without spe-
cial Damages.

his Discredit; they were held actionable, tho' there were other Words put in, *he owes me 100 l.* and it might be intended that the Words meant, he will not be worth a Groat when he has paid me my 100 l. and it was not as much as said that he was not able to pay the 100 l. *Style 425.* Said to a Tradesman, *Thou art in a broken decayed Condition*, and held actionable; and to say that one is not worth a Groat, is worse than to say that he is in a decay'd Condition. The only Case against us is that of *1 Ro. Ab. 86.* An Action by a Dier for these Words; *Thou art not worth a Groat*; and there it is said Judgment was arrested, it was Error of a Judgment in a Country Court: And the Declaration averr'd, that where the Words were spoke, the Words spoke of a Tradesman were of the same Acceptation, as if it were said that he was a Bankrupt; and it was held there was no Occasion for the Averment, for the Words were intelligible enough of themselves, but that the Action would not lie; for tho' he were worth nothing, yet he might have good Credit. But in the same Page it is held, that to say of one that trades, *That he is a beggarly Fellow*, with Averment that it was said in *London*, where they did import that he was a Bankrupt, was actionable. And we think the Averment signifies nothing in the Case, for it does not alter the Nature of the Words; for to say of a Tradesman in any Place, that he is not worth a Groat, imports a Scandal; and no body will trust a Man that is thought to be worth nothing. And the Case of *Boxelsworth*, *Thou art a beggarly Fellow, go home and pay your Debts*, was cited; and held it was hard in nothing but the Excessiveness of Damages. And *Hill v. Drake*, *Ray. 184.* *He is a beggarly Fellow, and not worth a Groat, and not able to pay his Debts*; which later Words, *not able to pay his Debts*, do not aggravate the Case. *Jud' pro Quer', per tot' Cur'.*

Shaw versus Bull.

Salk. 234,
236.
6 Mod. 106.
One seized of
two Houses
devises one
House to A.

and her Heirs, she paying his Legacies, in case his Goods and Chattels were not sufficient; and if she did not make Provision for the Payment of them in her Life-time, the Legatee might sell the same: And all the Overplus of my Estate to be at A.'s Disposal; and made her Executrix. The second House does not pass.

ONE seized in Fee of five Messuages, by his Will devised two of them to his Wife for Life, remainder to his two Daughters in Fee; and devised the third to the Wife and her Heirs; the fourth he devised to the Wife and her

Heirs, she paying his Legacies, in case his Goods and Chattels did not answer them all: And if she did not make Provision for the Payment of his Legacies in her Life-time, that it should be lawful for the Legatee, after her Death, to sell the said Messuage, to satisfy the Legacies out of the Value thereof. And then follows this Clause, on which the Doubt arises; *And all the Overplus of my Estate to be at my Wife's Disposal, and make her my Executrix.* And the Court deliver'd their Opinions *seriatim* thus:

Blinco: It appears he had five Messuages, and devised four of them, and says nothing expressly, or at least particularly of the fifth; but the Question is, whether there be Words enough to shew his Intent was to pass the fifth Messuage to his Wife; for if that appear to be his Intent, it ought to go to her. If he at first had devised her all his Estate, this house would have pass'd to her; but compare this Clause to the subsequent Words, *and make her my Executrix*, it shews his Intent was to grant her such Estate as she was capable of as Executrix, and that is only Personal Estate; so the Sense would be, *And I give my Wife all the Overplus of my Personal Estate, and make her my Executrix*: If he had said *I make my Wife my Executrix, and give her the Overplus of my Estate*; that would only give her Personal Estate or Chattel; and will it not be the same Thing to invert the Sentence? Again, to consider this Clause as it stands with the precedent Words, there is a Devise of the fourth Messuage to her and her Heirs, paying his Legacies, &c. And if she does not provide for Payment of them, that it shall be lawful for the Legatee to sell it; and all the Overplus, &c. which may very well be satisfied by making a Devise of the Overplus of the Price of the House, when sold by herself or Legatee; for if she in her own Life-time had sold the House, it would become a Chattel of an Inheritance; that is, the Overplus after paying the Legacies, was what he intended her by these Words. For the House being devised to her and her Heirs, and order'd to be sold for Payment of Legacies, the Overplus would perhaps in Equity be adjudged in her as Executrix; but by these Words, and this Construction, she would be a Residuary Legatee. So that if you couple it with the subsequent Words, she has only the Overplus of his Chattel-Estate; if with the precedent, it will be the Overplus of the Purchase-Money of the fourth House, when sold; and so by no means does extend to the fifth House.

Making one
Executor, and
giving the
Overplus of
the Estate,
gives only the
Personal E-
state.

Words which of themselves would disinherit an Heir at Law, if join'd with others which make them less forcible, shall be constru'd for his Benefit.

Noy 48.

Powell: Uncertain Words in a Will must never be carried so far, as by them to disinherit the Heir at Law: And tho' there be Words which of themselves would disinherit him, yet if they come in Company with other Words, which do render their natural Import less forcible, they ought to be construed favourably for the Heir. And the Case of *Bowman* and *Milbank* was upon this Reason; the Words were, *I give all to my Mother*, which might include whatever he had to give, either Chattel or Inheritance; yet because it may be *all personal* or Chattel, or *all real* or Inheritance, it was taken to be too loose and general to disinherit an Heir at Law; and therefore no Land did pass. Noy 48. *A.* seis'd of *Black-Acre* and *White-Acre*, devises both to his Wife for Life; the Remainder of *Black-Acre* to *J. S.* in Fee, and leaves the Fee of *White-Acre* undisposed of, and then said, *And I make my Wife my Executrix of my Goods and Land*; the Inheritance did not pass, tho' the Words, according to the Civil Law, would include it.

An Inheritance yet will pass in a Will by the Words *all my Estate*; yet they are very general, and do take in a Personal Estate, or a Real Estate, or both together; and therefore, when the Words *all my Estate* are in a Will, they are always let to be govern'd by some other Words in the Will. And therefore in the Case of *Jonson* and *Kerman*, a Devise of all his Estate, paying Debts and Legacies, and he was found to owe Debts beyond his Assets; the Inheritance was adjudged to pass. A Man, among all other Things, devises his Personal Estate; his Inheritance does not pass. 1 *Mod.* 100. 3 *Keb.* 140, 145. One devised all his Tenant Right in *Dale*; if he had no other Freehold in *Dale* it shall pass; *secus* not. *Vide* 3 *Mod.* 45. *Reeves v. Winnington.* I hear *J. S.* is enquiring after my Death, but I am resolved to leave him nothing but what his Father left him, but I leave all my Estate to my Wife; there the Wife took all the Real Estate, and the Reason was, because of the other Words, which shew he meant to exclude the Heir at Law. *Mich.* 32 *Car.* 2. *Ro.* 473. *A.* had Freehold and Copyhold Land, and makes his Will in these Words; *I give all my Estate, of what kind soever, not before mentioned by me, to my Wife, whom I make my Executrix*; and it was held the Copyhold Land did pass, not by Force of the Words alone, but because it appear'd that he had made a Surrender of the Copyhold Estate before to the Use of his Will. But here is nothing to help the Words here; for 1st, Here is a Devise of his other Houses by particular Words, two of them he gave her for

for Life, with Remainder over; the third to her and her Heirs; the fourth for her and her Heirs conditionally, and all by express Words. And it is hard to say, that if he design'd her the fifth House, that he would attempt to pass it by these general Words, more than he did the former Houses; especially to make such Construction to disinherit an Heir at Law.

Obj. What is meant by these Words, if the fifth House does not pass, it cannot be the Residue of his Personal Estate, for he had not enough to pay his Legacies; and it is plain Part of them were not to be paid till after the Death of the Wife; for the Words are, *That if she in her Life-time did not pay them, then the Legatees might sell*; and therefore the Words cannot be satisfied by applying them to the Residue of the House when sold, for it was not to be sold till after her Death; and to leave the Residue of a Thing not to be disposed of till after her Death, at her Disposal, seems unreasonable.

Ans. It does not appear what Personal Estate he might have, tho' he made this cautionary Provision for fear he should not have enough; and there might happen some Contingencies, for which wise Men do make Allowances in their Designs; besides it is plain he meant the Wife should make Provision for the Payment of the Legacies in her Life-time, and then she might sell the House in her Life, and then the Words would have a natural Operation, *viz.* to give her the Residue of the Value of the House. And suppose neither of these Things were, she might dispose of it by her Will, like one Contingency of a Distribution, which none know till Distribution made.

Nevill contra: I agree the Words of a Will to disinherit an Heir at Law, must be very plain and apparent in the Will; but since Men may devise their Land, as well as pass it by Deed executed, we ought to follow their Intent, and make it their Will and not ours. It is true an Heir at Law shall not be lightly disinherited, and the Intent of the Testator is to be gather'd from the Words on the Face of the Will. But sure the Words in Question are very comprehensive, (all the Overplus) which relates to something before, of which it is an Overplus; and the Things gone before are a Real Estate of Inheritance: And if he had said, all the Overplus of my Real Estate, the fifth House would pass by it; and these being *verba relata* are the same.

Trevor, C. J. I agree with my two Brothers that spoke first. The Cases of this Kind in Books are each upon its own

To make an Inheritance pass under the Words *the Residue*, or *Overplus of my Estate*, the Intent must be very plain; for if they stand indifferent to real and personal Estate, shall not disinherit Heir.

own particular Reason, and affect not this Case. And I confess in Construction of Wills, generally, the Words *my Estate*, *the Residue of my Estate*, or *the Overplus of my Estate*, may well pass an Inheritance, where the Intent is apparent to pass it; but such Intent, to carry an Inheritance by such Words, must be very apparent, and necessary to be drawn from the Words of the Will, and Circumstances of the Case. For if the Words be indifferent to real and personal Estate, or may be applied to personal alone, there the Heir at Law is not to be disinherited by the Implication of such Words, or by any Implication at all, but what is a necessary one. *Style 293.* Devise of Land paying all his Debts and Legacies, the Inheritance passes; because, by the apparent Intent of the Testator, his personal Estate was not sufficient to pay his Debts, &c. and so for the Necessity of performing his Intent in Payment of them, it was held the Inheritance did pass. 3 *Keb.* 45. upon the same Reason.

Then, upon Consideration of the Parts of this Will, there is no necessary Intent to be gathered from the several Parts of it to pass this fifth House. 1st, It is plain the Testator was very particular in expressing what he would pass in his Will, and leaves little Room for Construction; he very particularly and expressly devises and limits the four Houses, and what Estates devisees shall have in them; and that of a Sudden he should alter his Method of devising, and go about to give his Wife an Estate by general and doubtful Descriptions, seems odd; and we will intend he remained consistent and agreeable to himself during the whole Will, and knew that what he did not give to the Wife would go to the Heir; and therefore had no Occasion of saying any Thing of the fifth House, or of him.

And as to the Objection, that if these Words do not carry the fifth House, they are of no Use; I own, if that were true, it were a weighty Objection; but they are to be otherwise well satisfied; for the fourth House is devised to her in Nature of a Trust, liable to the Payment of Legacies, and upon Default in her, Power is given to Legatees to sell; so if these Words had not been put in, what should become of the Overplus; it would be doubtful how that would be in Chancery, and there are Cases on both Sides; it was a Question, whether when Lands are given in Trust, and Money is raised by Sale of them, and there is an Overplus, whether that shall be a resulting Use for the Heir at Law, or for the Trustee. *Vide Brown v. North*, in *Bridgman's* Time, it was a Question again; and it was held the Trustee should

have

have it. So here being a Trust in the Wife of the fourth House for Payment of Legacies, it was not unnecessary to explain that it was his Intent the Wife should have the Surplusage or Overplus; which rightly signifies a Residue of something before not disposed of. And this Residue, after Sale and Payment of Legacies, is an Overplus of his Estate; and where Words in a Will may be satisfied, without carrying an Estate from the Heir at Law, they shall never be construed to disinherit him; for the Heir is not to be disinherited at all by any Implication, but such as are necessary, and without which the Words would be rejected as void, and of no Sense or Signification. And she herself might sell in her Life-time, and then she was to have the Residue; or if the Legatee sold after her Death, her Executor should have it in the Right of her, and not as Trustee to be accountable to any. *Jud' acc' per Trevor, Powell & Blincow.*

Where Words in a Will may be satisfied without taking an Estate from the Heir, he shall not be disinherited.

Wetherell versus Clerkson.

CASE for these Words, *You are a Whore, and a perjur'd Whore, per quod* she lost her Marriage. After Verdict for Plaintiff it was moved in Arrest of Judgment, that she had not laid in certain with whom she had lost her Marriage; for the Words being not actionable, but in Respect of the special Loss, therefore that ought to be shew'd in certain, for it is issuable. And tho' it was objected, that the Jury have found Loss of Marriage, and then it must have appeared to them, and that could have been only with one; and *Hetley* 8. was quoted for this; yet the Court held the Objection fatal; for where the laying of particular Damage is the Gift of the Action, it ought to be laid specially and certainly, that the Defendant may have an Opportunity of traversing it; and there is no Case where the laying of particular Damage is necessary to the Maintenance of the Action, but it must be laid certainly; and the Opinion in *Hetley* is long since exploded; *secus* where the particular Damages are not the Gift of the Action, but only an Aggravation. *Et Quer' nihil capiat per Billam.*

Words. *You are a Whore*, by which she lost her Marriage; with whom must be set forth, else ill.

Wherever laying particular Damages is necessary to the Maintenance of the Action, they must be laid certain.

Coke versus Heathcot.

Principal and Interest not brought into Court on a Counter-Bond.

NOTE; Court will never give Leave to bring Principal and Interest into Court, and stay Proceedings upon a Bond when the Suit is upon a Counter-Bond, or when there is any Pretence of a collateral Agreement.

On Relief by *Audita querela* he is restored to all that was lost.

Note; When one is relieved by *Audita querela*, he shall be restored to whatever he lost by the Judgment. And if a Man has a Release from the Plaintiff which he has not an Opportunity of pleading, and brings reasonable Proof of it, the Court will relieve him upon Motion, and award a *Supersedeas* of the Execution. And upon an *Audita querela* the Bail generally ought to be put in in Court.

Cannot amend after Issue joined.

One cannot amend after Issue joined and entered, much less after Verdict; and who discontinues must pay Costs.

Stedman versus Robison.

In Suit in inferior Court, it must appear the Contract was within the Jurisdiction.

False Judgment from a County Court, where Debt was by *Justices*; the Declaration was, that the Defendant was indebted to Plaintiff, within Jurisdiction of the Court, for Goods sold and delivered, and because it was not alleged that the Contract was within the Jurisdiction, Judgment was reversed; for if one be indebted to another he is so wherever he goes. *Vide 1 Vent. 243.*

Gwin versus Thornborough.

Leet may amerce for a publick Nuisance.

PER Cur': One cannot be amerced in a Leet for a private Nuisance, but may for a publick.

Roberts versus Arthur.

When there is a *Profert* of a Deed it remains in Court all the Term.

PER Cur': If upon pleading a Deed a *Profert* be made of it, it shall remain in Court all the Term, and no longer, if it be not controverted; but Letters of Administration shall not be kept in Court all the Term, because the

Administrator may have other Actions pending, and it would be a Prejudice to him. *Vide* 36 H. 6. 30. And giving of Oyer is the Act of the Court, and therefore to be done by the Prothonotary in his Office, where now the Course is to do such Things as were done in Court, when the Pleadings were *Ore tenus*, at the Bar, and an Attorney ought not to do it.

Worsenholm versus Manucaptors of Berks. In B. R.

SCI' fac' against Bail, who plead no *Capias* against the Principal. Plaintiff replies and sets forth a *Capias* returnable *coram Rege* indefinitely; and upon *Nul tiel record* produce one *coram nobis apud Westm'*; and upon Demurrer, it was urged by *Squib* and others, that here was a Variance. *Vide Dy.* 153. 7 H. 4. If one plead an Outlawry at Suit of *A.* and produce one at Suit of *B.* it will be a fatal Variance; for if it were ascertained at whose Suit the Outlawry was, the other might reply that it was reversed; and a *Capias* returnable *coram Rege ubicunque*, and *coram Rege apud Westmonast'*, are distinct Species of *Capias*. If a Plea be held before nine Commissioners, and a *Certiorari* comes to remove the Record, and the Record certified be said to be *coram* eight, it will be a material Variance; tho' it may be said, if it were before nine, *a fortiori* it is held before eight; *quod fuit concessum*. And *Holt C. J.* said, if a *Capias* be *coram nobis ubicunque crast' Animarum* for the Purpose, and before that Day the Term is adjourned to *Oxford*, by that *Capias* the Parties have a Day at *Oxford*; but if in that Case it were *coram nobis apud Westmonast'*, the Parties indeed would have a Day at *Oxford* by the Writ of Adjournment, but not upon the *Capias*; and when a Writ is returnable at a common Day, it is always *ubicunque*; but if the Court be at *Westminster* at the Time of issuing the Writ, and it be made returnable *coram Rege* at a Day certain, it must be intended at *Westminster*. But *per Cur'*: This is no material Variance; and they compared it to the Case in *Hob.* 54, 55. where a *Capias* was pleaded, which being without Addition is to be understood of an original *Capias*, and an *Alias Capias* produced, and it was held it did maintain the Plea. *Yelv.* 46. 2 Cro. 32. Case for malicious Prosecution; upon an Indictment *coram* such and such Justices of Peace, *Nec non ad diversas felonias*, &c. and in the Indictment they were filed only Justices of the Peace; and yet it was held well, being the

Capias returnable *coram Rege*, one produced *coram nobis apud Westm'*, no material Variance.

1 Vent. 46.

Vide 1 Vent.

233, 234.

2 Lev. 85.

A Record taken before nine, one returned before eight is a material Variance.

the same in Substance; so here; and the Difference between a material and substantial Variance, and what is not material; as in the Case of a Record before nine, and a Record before eight removed, the Variance is material; for that it was before nine is the Description of it; which does not agree with a Record before eight; of the other Hand *vide Br. Fail. of Record, f. —*. In an Assize the Tenant pleaded a Recovery against J. and produced a Record of a Recovery against J. and his Wife, and judged good. And *Jud' pro Quer'*.

Beech versus Trevors.

Debt on Recognizance, *cognovit se debere* held well.

DEBT upon a Recognizance in Chancery; Declaration was, that the Defendant *personaliter constitutus coram Rege in Cancellaria cognovit se debere* in such a Sum; and Broderick excepted, that here were no obligatory Words; *secus* if it were *debere*. But *per Cur'*: Tho' it might be better so, yet *debeor* is said passively; and the Word *Debeo* is not necessary to make a Debt, for *teneri* or *obligari* would do. And there is no such Word in true *Latin* as *Indebitatus*; yet it has now obtain'd in Law; and Plaintiff had Judgment.

Note; Holt asked the Counsel for Plaintiff if Debt were brought in the Common Pleas upon a Recognizance in Chancery, and the Defendant craved Oyer thereof, what must be done? For if Covenants be, and Bond for Performance, in Debt thereupon the Defendant's Way is to produce his Part: *Vide 1 Sav.*

At Nisi prius coram Holt.

PLAINTIFF in Case declared of an Agreement made between him and the Defendant, that the Defendant would let him have the Use of twelve Acres of Turnips for such a Time, for his Sheep; and the Evidence was, that he would let him have twelve Acres of Turnips. And *per Holt*; It maintain'd the Declaration; for the Land did not pass, as it would by Grant of so many Acres of Pasture; but it is like granting so many Acres of Corn, whereby the Corn only would pass.

Dominus Rex versus Worsenholm & Weeks.

THEY being indicted, one of them removed it by *Certiorari*, entering into a Recognizance to carry it down to Trial. And it was resolved, that the Indictment was removed *quoad* both; and that the Defendant who removed it saves his Recognizance, by trying it as to himself; for that the Acquittal of one is not an Acquittal of the other, nor *vice versa*; neither can it be exacted of him to enter into a Recognizance to try against both. And that notwithstanding the other Defendant had appeared below, and now by the Removal is put without Day; wherefore if he do not come in above *gratis*, Process of Outlawry shall go against him; and for this Cause it was, that before the Statute, the Course was to grant no *Certiorari* to remove Indictments from *London* or *Middlesex*, without the Defendant gave Bail to try it. And the Chief Justice said, it is always indorsed on the Back of the *Certiorari*, at whose Request it is granted; for tho' it be the King's Command, yet it is at the Prayer of the Party; and the End of *Certiorari*'s is to do Justice, and prevent Vexation and Oppression. And if two be indicted jointly, and join in Plea, there shall go but one *Venire fac*; *secus* if they sever.

Indictment against two, one of them removed it by *Certiorari*, it is removed *quoad* both.

Certiorari is indorsed at whose Request it is granted.

Dominus Rex versus Love.

TO a *Mandamus* to swear him Common-Council Man for the Town of *Cambridge*, it was returned, that he had not taken the Oaths according to 23 *Car. 2.* And good *per Cur'*, after Arguments.

Return to a *Mandamus* to swear in a Common-Council Man, his not having taken the Oaths, good.

The Principal died before the Return of the second *Sci' fac* against the Bail, and after a *Capias* return'd against the Principal. And it was urged, that since the Bail would have been discharged by rendering the Principal at any Time before the second *Sci' fac* returned, and that they are now deprived of that Advantage by the Act of God, it were but reasonable to discharge them. But *per Cur'*: It cannot be; for it is Indulgence to allow a Render after a *Capias* return'd in Discharge of them; and their Recognizance is forfeited upon the *Capias* return'd against the Principal; and the Court will only discharge the Bail after, where they render, but

Vide 1 Jo. 139. Principal died before the Return of the second *Sci' fac* against the Bail.

Ante p. 112, 236.

Death of the Party before Return of *Capias*, a good Plea to the *Scire Facias*. not where they cannot; but the Death of the Party before a *Capias* return'd, had been a good Plea to the *Sci. Fa.* and so was the Rule.

Writ of Error cannot be quash'd before Error assign'd. *Per Cur'*: A Plaintiff in Error cannot move to quash his Writ of Error before Error assign'd.

At Nisi prius coram Holt.

A Person, who had compounded an Indictment for an Offence of a publick Nature, was fin'd. **I**N Case for Money received to the Plaintiff's Use, it appear'd on Evidence that the Defendant had indicted the Plaintiff for regrating Wool; and after compounded the Matter with him for a Sum of Money, for which Money this Action was now brought by the Plaintiff. And *Holt* was so angry with the Parties for compounding an Indictment of a publick Nature, that he had the Plaintiff nonsuited, and fined the Defendant; but he said if it were an Indictment for a private Wrong they might do it.

The Remedy against Factor is Account, but if he converts, Trover lies. *Per eundem*: The proper Remedy against a Factor, acting as such, is Account; but if he converts, Trover will lie against him. *A.* finds Goods of *B.* and refuses to deliver them to him, his Remedy is Trover; and if *C.* happens to get them, *A.* may maintain Trover against him, but he shall have but one Satisfaction; but after *A.* has recovered against *B.* *B.* may maintain Trover against *C.*

Per eundem: The Confession of the Party is Evidence, but the worse Sort of Evidence.

Physicians not to practise in London, or seven Miles round, without Licence of the College; any where else must be a Graduate, or have Licence. Ante p. 386, 387. *Per eundem*: Since the Statute of *H. 8.* of Confirmation of the Charter of the College of Physicians, none can practise Physick in *London*, or within seven Miles round it, without a License from the College; and the Exception therein does not qualify the prohibitory Clause in it, but only orders that in all Parts of *England* a Practiser of Physick must either have a License from the College, or be a Graduate in either of the Universities; and that, he said, was the Scope of the Statute in few Words. And *per luy*, If an Action be brought upon Act of Parliament, and it be set forth to have been held by Prorogation, when it was by Adjournment, it will be fatal; and before the Time of *H. 6.* Acts of Parliament were by Way of Petition and Answer.

A Woman, whose Husband had left her about twelve Years before, had carried on a Trade in her own Name as a Widow, and gave Receipts in her own Name; being sued for Debt contracted in the Course of her Trade, gave Cover-
 ture in Evidence, and gave Evidence of her Husband's having been lately alive in *Ireland*; and my Lord directed the Jury to find for the Defendant, and so they did.

A separate Trader cannot be sued for a Debt contracted in the Way of her Trade, if the Husband be living.

Per Custod' sigill' in Cancell': This Court will never help a defective Conveyance, without Consideration; as if a Man voluntarily makes a Conveyance to another of his Estate, and it proves defective; *secus* if it be for Money, Marriage, Jointure, &c. And whereas *Pratt* at the Bar affirmed that Equity would compel an Execution of a Trust declared expressly, tho' without Consideration; my Lord answer'd, I do not think so truly.

Equity will not help defective Conveyance, if without Consideration.

Per Clerk, Master of the Office: If there be a visible Attorney, a leaving a Declaration in the Office not sufficient; *secus* it is good.

Eyres moved to quash an Indictment for taking away Goods of *A.* to the Value of ten Pound in Money number'd; and the Exception was for the Incertainty of what is meant by the Word *Pound*, whether Pound Weight, or Pound *Sterl.* But *per Cur'*, Pound of Money is of known Signification in Law, and the Term used in all Originals, *Præcipe A. quod reddat B. cent. lib.* And so are the Conclusions of Writs and Counts *ad damn' cent. lib. &c.* and he took nothing by his Motion.

Vincent versus Preston.

Plaintiff declared on two several Promises of fifty-five Pounds: Defendant pleads that *quoad* the first fifty-five Pounds Plaintiff *actionem habere non debet*, because there was but one fifty-five Pounds due at the Time of several Promises; and that the several Promises were for that one fifty-five Pounds, and that after the several Promises he paid the said fifty-five Pounds; and concludes in Bar of the Action generally. And *per Cur'*, If you had said thus, that *Actio non*, &c. without the (*quoad*) it had been well; but here you lay your Plea to the first fifty-five Pounds by the *quoad*, and tho'

When a Plea begins with a *Quoad*, it is restrain'd to what that refers to, and shall not be extended further.

tho' your Conclusion be general, yet it shall not enlarge the Plea; which is restrained in its Beginning. And if Trespass be brought for Assault, Battery and Wounding; it would not suffice to answer the Wounding; for the one may be without the other, *viz.* the Battery without the Wounding: And they all agreed; that when one begins his Plea with a *quoad*, he thereby restrains it to what the *quoad* refers to; and tho' the Matter of the Plea be such as would go to the whole, and the Conclusion be general, yet it shall not go beyond the Matter to which the *quoad* refers.

Cole versus Acorn.

If Sheriff levies Money on a *Fieri Facias*, and returns *Fieri Feci*, Debt will lie against him.

IN Debt against a Sheriff, the Plaintiff declared upon a Judgment obtained against *J. S.* and had sued out a *Fi. Fa.* and delivered it to the Defendant, who *virtute* thereof had levied the Money: The Defendant pleads *nihil debet*, and adjudged a good Plea. And this Difference was taken, that where the Writ has not been returned, the Plea is good, because it is Matter of Fact whether he has levied the Money or not; *secus* where the Writ is returned *Fieri Feci*.

Dominus Rex versus Emmery.

Person acquitted on Information had Costs.

Defendant having been acquitted upon an Information moved for Costs, and had them; and the Difference is, where the Judge, who tries the Cause, certifies probable Cause of Prosecution, and where not.

Peters versus Benning.

Writ of Error *ad proximam Sessionem Parliamenti*, and before that Time it was dissolved, and Day fix'd for the Meeting of a new one, and Term intervened, whether a *Supersedeas* of Execution.

A Writ of Error *ad proximam Sessionem* in Parliament, and before that Time the Parliament by Proclamation was dissolved, and Day fixed for the meeting of a new one; and upon Motion the Question was, whether this Writ were a *Supersedeas* of Execution, or even could be a Warrant to send up the Record to the new Parliament, there being no Term intervening between the Return of the Writ and the Time fix'd for the Parliament's Meeting. And *1st*, It was

Per Holt: The Record is not removed.

agreed on that the Court can take no Notice of any extra-judicial Determination or Order of the Lords. And *per Holt*, If an Impeachment be in one Parliament, and some Proceedings thereon, and then the Parliament is dissolved, and a new one call'd, there may be a Continuance upon the Impeachment; and he quoted the Case of *James and Bertly*, *Pasch. 5 W. & M.* where a Writ of Error was tested the fourth of *May*, returnable the nineteenth of *November* following, to which Time the Parliament was prorogued, so that a whole Term intervened; and he said it was his Opinion they might sue out Execution notwithstanding that Writ. And he remembred to have known it Ruled in *Keeling* and *Hale's* Time, that a Writ of Error was no *Supersedeas*, after a Prorogation, if a Term intervened. *Vide 3 Keb. 416. 1 Vent. 266.* And the Case in *2 Cro. 341.* was laid to be in Point, that a Writ of Error, and all the Proceedings thereon, are determin'd by the Dissolution of a Parliament. *Vide Lane 57. 1 H. 7. 19, 20. pl. 50. Br. Err. pl. 25.* That Plaintiff in Error is notailable in Parliament for two Reasons; one, That if the Judgment should be affirmed, they could not award Execution on the Recognizance. *2dly*, If the Parliament should be dissolved before any Thing done, all Matter depending before the Parliament would be thereby determin'd. Likewise a Transcript of the Record, and not the very Record itself, is before the Lords upon a Writ of Error; and in that it differs from a Writ of Error from *Ireland*, or from the *C. B.* into this Court, where in the one Case the Execution is to be awarded here, but in the other Case it is not so for the Necessity of the Thing, because the King's Writ runs not into *Ireland*; the Course is to send a Mandate to the *C. J. of Ireland* to grant Execution. *Vide Jo. 66.* That Dissolution determines Error actually depending. *Ray. 5.* That a Prorogation, and a whole Term intervening, is a *Supersedeas* of a Writ of Error in Parliament; and so of a Dissolution, tho' the Errors had been assign'd. If before the Transcript be left above, the Parliament was dissolved, the Writ was no *Supersedeas* of Execution; but if it had been left above, the Dissolution would be a *Supersedeas* of it; but the Writ of Error would not be discontinued, there being a Day certain for the meeting of a new Parliament, by the very Act of Dissolution. It may be a Question, if a Writ of Error *ad proximum Parliam'*, when a Parliament is to meet at a Day certain, be a *Supersedeas*, tho' a Term does not interpose between the Teste of the Writ and the Time fixed for the meet-

If Proceedings be on Impeachment, and Parliament be dissolved, may proceed in another Parliament.

If Term intervenes between a Prorogation, Execution may be sued. *Vide 1 Vent. 31, 100. 1 Mod. 106. 1 Sid. 44, 45.*

Vide Dy. 375. 1 Jo. 66. Transcript of Record is only before the Lords in Writ of Error.

The King's Writ runs not to *Ireland*. *Ante p. 225.*

If Writ of Error be left in the Lords, and there be a Dissolution, it is a *Supersedeas*, but the Writ of Error is not discontinued.

Vide 1 Vent.

ing of the Parliament by the Dissolution of the former Parliament; but the Chief Justice said, that as the present Case was, the Writ in Question could not be an Authority to carry up the Record, neither could the Lords be legally possess'd of it by Virtue of that Writ. And he said in Case of Prorogation, the Writ of Error was returnable *ad presens Parliamentum*; but in Case of Adjournment it was *ad present Session*. And after all here the Court left them to do what they could by Law.

Paulhill versus Powell.

Whether
Commitment
by either
House of Par-
liament be
within the
Habeas Corpus
Act.

HE was one of the five *Kentish* Petitioners, who petition'd the Commons in an insolent Manner to grant Taxes, in order to war against *France*; and being order'd into Custody of their Serjeant, he now brought an Action of the Case against him for not shewing him a Copy of his Commitment within six Hours after, according to the *Hab. Corp. Act*; and upon Motion in the Case, *Holt* said that one may upon this Act plead *nihil debet*, and give the special Matter in Evidence in Debt upon this Statute; and he said the Commons never commit but by Vote, or a Warrant under the Speaker's Hand. And whether the *Hab. Corp. Act* extended to Commitment by either House of Parliament, would be examin'd hereafter: And he said one may apprehend without a Warrant, but not commit without a Warrant in Writing; and the Difference is between Apprehending and Committing, that the one is in order to the other, that is, the Apprehending is in order to carry before a Magistrate who has Power to commit.

Waldegrave's Case.

Whether De-
claration may
be deliver'd
on Sunday?
Per Holt: It
may not.
Postea Hill.
13 W. 3.
Taylor's Case.

DECLARATION was deliver'd on *Trinity Sunday*, and debated on Motion, if such Delivery were not void by the Statute of 29 *Car. 2. c. 7.* And *per Holt*, strongly it is; for 1st, It is no Act of Necessity within the Meaning of the Statute, as putting of Ecclesiastical Procefs upon the Church Door, or making a Tender to save a Penalty. And he said he would take the Word *Procefs* for *proceeding*, and such Construction as tends to a better Observation is to be made: And this Declaration, as deliver'd, could not be taken notice of without breaking of the *Sabbath* till *Trin. Term*; for that

that by the Statute of 32 H. 8. c. 21. begins on *Monday*; but *Quind. Pasch.* is indeed always on the *Sunday*, but is kept on the *Monday*. And *per luy*, If an Arrest of a Person, that skulks all the rest of the Week, be void on *Sunday*, *a fortiori* this will be; but *Gould et Powis dubitabant*.

Per Holt at *Nisi prius*: In Debt upon a Bond upon Issue of *Non est factum*, if Plaintiff prove the Witnesses dead, beyond Sea, or that he has made strict Enquiry after them, and cannot hear of them, he shall be let in to prove their Hands. Hands of Persons beyond Sea admitted to be proved. Ante p. 521.

And he, with Indignation, ask'd why Actions are not brought against Justices of Peace, who order People to be whipt in *Bridewell*, without Oath made before them, or Power to convict. Justices cannot order whipping without Oath made.

In *Assumpsit* for Money received to the Plaintiff's Use, the Question at the Trial was, who was the rightful Yeoman of the Black-Rod? and it was said he was an Officer under the Usher of the Black-Rod, and in Nature of a Deputy to him, and therefore to be nominated by him; and it was compared to the Case of Sheriff, who alone may make his own Under-Sheriff. It was agreed, that the Usher himself is created by the King, and is a Patent Officer under the Garter Seal; and so is the Clerk of the Lords. And *per Holt*, If the King grants an Office to commence after the Death of *A.* who has nothing in the Office, it is void. *Note*; The Privy Signet or Sign Manual, is nothing but the King's signing his Name *W. Rex*.

D E

Term. Sanct. Hill.

Anno 13 W. III. in B. R.

Ballard versus Gerard.

Salk. 333.
Suit cannot be
in Spiritual
Court for the
Fees of a Re-
gistrar.

THE Registrar of a Spiritual Court libell'd there for certain Fees belonging to his Office, as for a Groat for every Oath administer'd, and other small Fees accruing to him in the Exercise of his Office; and Proceedings carried to an Excommunication; and Prohibition moved for, upon Suggestion that the Office of a Registrar is a Temporal Office, and by Consequence Matters concerning the Fees thereof were only conusable at Common Law. And tho' it was objected to be for Fees accruing for the necessary Exercise of his Office in Court, which Fees were his sole Recompence; and so small from every particular Person, that to put him to an Action at Law, would be in effect to deprive him of them intirely: And some of them may be such, for which there may be no Remedy at Law, as in case of the Box Money of this Court, or the Fees of a Door-keeper; and as to the *Quantum* of them, they are assess'd by Court; and any Court, ancient or new, that have necessary Officers, may ascertain Fees to them, and all those that use the Court shall be concluded thereby; and yet those Fees may be so small from each Person, that it may not be worth while to bring an Action at Law for them; and it was said, if one refuse to pay the Fee of the Door-keeper, the Court would commit him, and that was the only Remedy. *Holt contra*: As to your Case of the Box Money, he shall not have the Rule if he does not pay for the Box; and we cannot justify Committing one for not paying of Fees, and sure there must be an original legal Remedy, if there be Right; and sure the Office of Registrar or Arch-

Archdeacon is a Freehold, for which an Assise will lie; and if so, a Denial of the reasonable and usual Fees thereof will be a Disseisin of his Office. And no Court has a Power of settling the Fees of its Officers, so as to conclude the Subject; but thus far they may go, as to judge what are reasonable Fees; and in a *Quantum meruit* by the Officer for such Fees, the Judge's assessing them reasonable may be good, but not conclusive Evidence to a Jury; and so of the Table of the usual Fees of a Court not newly erected; and after it is once found reasonable by a Jury, then it may become conclusive Evidence; and so it has been adjudged, 15 Car. 2. between *Beal* and *Prior*; for the Fees of the Registrar of the Office of Insurance; *vide Hard.* —. However he thought it very proper for a Prohibition to have it settled judicially. And he said, he would never grant a *Mandamus* to swear the Registrar of Spiritual Court, or an Official, but would put them to an Assise. And he said, it were very unreasonable to suffer the Spiritual Judge to determine the Right of Lay Persons; and he had known an Official obtain a Prohibition when they would sue him in Order to a Deprivation below, tho' contrary to the Case of *Sutton's Hospital*; and none could be concluded, as to a Temporal Right, by the Opinion of the Spiritual Court; and here a Prohibition awarded.

No Court has Power to fix Fees.

Vide 1 Vent. 165

No *Mandamus* to swear a Registrar. 1 Vent. 111.

1 Vent. 164.

Per Holt: Tho' Feme Covert seal and deliver a Deed, yet she may plead *Non est factum*, and give Coverture in Evidence.

Feme may plead *Non est factum*. Salk. 675.

Bill of Exceptions is no *Supersedeas* of a Judgment; but the Way is to bring Writ of Error, and assign the Exceptions for Error.

Bill of Exceptions no *Supersedeas*.

Defendant shall have no Costs upon Judgment for him in Demurrer in Abatement.

Ante p. 195. 523.

In Ejectment, if there be no Tenant in Possession to be served with Declaration, the Plaintiff must go the old Way of signing Declaration on the Premises.

Fenwick versus Lady Grosvenor.

Prohibition moved for on Libel for Co-habitation with a Woman, who to the very Day lived in the Dioceſe, on Suggestion of Citation out of the Dioceſe, reſuſed.

HE libell'd againſt her in the Spiritual Court for Co-habitation, claiming a Marriage with her; and Prohibition moved for, upon Suggestion that the Citation was to answer out of the Dioceſe, it being to Eccleſiaſtical Court of Peculiar of *Westminster*, whereas ſhe lived in *Cheſter*; but it appearing by *Affidavit*, that ſhe dwell'd for a conſiderable Time in *London* Dioceſe, and even to the very Day of the Citation, which was ſerved upon her juſt as ſhe was going away; the Court would not grant a Prohibition.

Appearance in Inferior Courts is to be enforced by reaſonable Diſtreſs. Officer cannot juſtify breaking a Houſe for ſuch Diſtreſs.

Per Holt: In Inferior Courts the Courſe is to enforce an Appearance by Diſtreſs, and that ought to be reaſonable; and if a Reſcous be made to a reaſonable Diſtreſs, the Steward may impoſe a Fine for it. And it would be too much to diſtrain Goods to the Value of the Debt demanded. And the Officer cannot juſtify the Breaking an Houſe to take ſuch Diſtreſs. And tho' Inferior Court may grant other Proceſſes out of Court, yet cannot they grant an Attachment on Contempt but in Court.

Judge of *Niſi prius* only Aſſiſtant in Writ of Enquiry.

Per eundem: A Judge of *Niſi prius*, upon Trial of a Writ of Enquiry, is only an Aſſiſtant to the Sheriff, and has no judicial Power; and if the Parties come to any Agreement, there the Way to make it effectual is to bring it to him to ſign, and after move above to have it made a Rule of Court.

Leaſe at Will may be determined by either Party, by Loſs of Rent accruing.

Per eundem: If one make a Leaſe at Will from Year to Year, either Party may determine it at Pleaſure, at the Loſs of the accruing Rent to him that determines his Will; but if one make a Leaſe for a Year, and ſo from Year to Year, as long as both Parties ſhall pleaſe, this is a Leaſe for one Year abſolutely; and if Leſſee continues on the firſt Day of the ſecond Year, he is bound for another Year; ſo is the Leſſor, if he has not warn'd him away before the Beginning of the ſecond Year. And a Leaſe for three Years to commence *in futuro*, by parol, is not warranted by the Statutes of Frauds and Perjuries.

Ingram versus Foot.

DEBT upon a Bond against an Administrator, who pleads ^{In pleading} in Bar a Recognizance in such a Sum entered into by ^{Want of Assets} his Intestate at such a Day, for the Appearance of ^{the Time} J. S. ^{must be set} such a Day in such a Court, and that the said J. S. did not ^{forth.} appear, whereby the Recognizance was forfeited, and that his Intestate was indebted by Bond to *Mary M.* in such a Sum, who in *Hill. Term ann. &c.* sued the Defendant, and obtained a Judgment against him in this Court, and that he had not Assets beyond what would satisfy the said two Sums *tempore exhibitionis billæ præd' Mariæ prædict' aut unquam postea*; to which the Plaintiff demurs.

And two Exceptions were. 1st, That it appeared the Plaintiff's Suit was commenced in *Mich. Term*, before the Exhibiting of the Bill of the said *Mary*; and the Defendant does not deny his having of other Assets than which he might have wasted by *Hill. Term*.

To this it was offered for Answer, that there was no express Mention made of any Bill exhibited by *Mary*, but only *Quod eum implacitasset*; and tho' that being in Debt in the King's Bench, it must necessarily be by Bill; and tho' the Words *Mariæ præd'* would tie it up to *Mary's* Suit in *Hill. Term*, yet since there was no Bill of *Mary's* mentioned before expressly, the Words would be rejected; and then it would be *tempore exhibitionis Billæ*, and that must be the Plaintiff's Bill. But it was answered and resolved, that in Truth it could not refer to *Mary's* Bill, for no such Bill was mentioned before; and then it was worse, for it referr'd to nothing; and then no Time is fixed when the Defendant had no other Assets. And this Diversity was put by *Brotherick*, when a Thing shall be rejected for Repugnancy, and when not; when subsequent Words make a Thing, well explain'd and perfect before, Nonsense, there such Words shall rather be rejected, than that what was well before should be made Nonsense; but where by the subsequent Words the Thing is made good Sense, but altered in its Nature from what it was before, they shall not be rejected.

Nota; When subsequent Words make a Thing said before Nonsense, shall be rejected; but where only alter the Sense, not.

The second Exception was, that by the Statute of 4 & 5 W. & M. All Recognizances are pardoned, except such as were before assigned to the Lord Almoner, and this being a general Act of Pardon, and concerning the King's Revenues, therefore the Court will take judicial Notice of it; and here
being

being a General Pardon of all Recognizances, this Recognizance is thereby to be judged pardoned *prima facie*, if it be not shewn to be within the Exception; and that is to be done by them that would take Advantage of it. And if it should be said, that the Recognizances assigned to the Lord Almoner, being excepted, were not pardoned even *pro instanti*; as in Case of *Proviso*, and then the Plaintiff, being the Party to take Advantage of the Statute, ought to shew it: This Diversity was taken by *Brotherick* upon that Rule, that he, that will take Advantage of an Act of Parliament with an Exception, must shew himself out of the Exception, *viz.* if the Exceptions be of Persons, the Rule holds; because the Court, upon reading of the Statute, cannot know whether he be the Person excepted or not; and therefore the Party, who knows himself best in that Case, must shew himself out of the Exception; and it is an Advantage given by the Statute to such as are not disabled to take it by the Exception; but if the Exception be of Offences, of which the Court may be inform'd by reading the Statute, he that pleads the Statute need not say, that it is an Offence not excepted; and for this he quoted *Noy 99. More 619.* And he urged the Opinion of *Poph. 93.* where, upon Consideration of the Statute of 31 *El. c. —.* all Jesuits are ordered to leave the Kingdom, on Pain of High Treason, by such a Day, except they are retarded by Strefs of Weather; it was held, the better Way of framing an Indictment thereon would be to do it generally, and let the Defendant bring himself within the *Proviso*, it being for his Advantage. *Vide* also the Case in *More 303.* Outlawry pleaded to Debt; Replication of gift of the Queen of General Pardon; and *Sci' fac'*; and returned, that the Plaintiff, at whose Suit the Outlawry was, was dead, and that Judgment was *quod eat inde sine die*; and yet there were Exceptions in that Statute, and the Plaintiff did not shew himself out of them; so there is not that Strictness required in pleading an Act of Parliament upon a collateral Matter, as when it is directly pleaded against the King. But *per Holt*: That Plea depended upon the Validity of the Judgment in the *Sci' fac'*, which tho' it were erroneous, yet was well while it stood.

To this it was answered, that Acts of Pardon are in the Nature of the King's Grant to the Subject, and therefore not to be taken Notice of, except they be pleaded; and there are Abundance of Authorities, that he that is to take an Advantage of an Act must shew himself out of the Exception of it; and here it is the Plaintiff that is to take Advan-

tage of the Statute. *Vide 3 Inst.* 234. settles the Law in this Case; for if the Act be a general Act of Pardon absolute, and without Exception, the Judges *ex officio* must take Notice of it; but if it has any Exception or Qualification either of Persons or Offences, he that would take Advantage of it must plead it, or else the Judges can take no Notice of it.

Holt: If a Man be indicted of Murder or Felony, he may plead Not guilty, and give a Pardon in Evidence; but if he have Occasion to plead a Pardon in Bar of any collateral Matter, there he shall not plead to Issue, and give the Pardon in Evidence; as if a *Sci' fac'* were brought upon a Recognizance, there you must plead the Pardon. And he agreed, that if the Act had directed that no Process should issue upon Recognizances pardoned by this Statute, a *Sci' fac'* could not be made out upon this Recognizance, without suggesting that it was excepted. And he said, they could not take Notice of a general Act of Pardon with Exception judicially, without its being pleaded specially, if the Act it self did not expressly ordain it. And he agreed there were many Authorities, that he that pleads an Act of Pardon should shew that he was not within the Exception of the Act; which *vide 3 Inst.* 234. Yet he could not think it necessary to do it, if the very Purview of the Act be not qualified and restrained; for if there be first general Words of Pardon, and after comes a *Proviso* or Exception, the natural Way is to plead the Pardon generally, and then the King's Attorney, upon View of the Pardon so entered on Record in the Plea, to shew that the Party is within the Exception. And whereas it is urged that this Act concerns the King's Revenues, therefore it is a general Law; the Difference *per luy* is, when an Act concerns the King's Revenues, for the King's Advantage it is general, and judicial Notice to be taken Notice of it; *secus* where it concerns it in Order to a Diminution thereof to the Advantage of particular Persons. And an Act of Parliament may be general in Part, and particular in other Part. And when an Executor pleads a Recognizance, he must set it forth to the Court, that Court may see whether it be to be performed or not; but if it be a Debt, they only need say, that a Judgment was obtain'd against him in such a Court, if it be in any of the Courts at *Westminster*; but if it be in an Inferior Court, they must give it Jurisdiction, and say that *taliter processum fuit*, &c. And here the Plaintiff had Judgment upon the first Exception.

If Executor pleads a Recognizance, he must set it forth; *aliter* if a Judgment in the Courts of *Westminster*.

If a Man be indicted for Murder or Felony, he may plead Not guilty, and give Pardon in Evidence.

But in respect of collateral Matter it cannot be given in Evidence, but must be pleaded.

1 Cro. 32.
More 770.
Cannot take Notice of Act of Pardon with Exceptions, without Pleading.

Vide 1 Cro. 449.
26 H. 8. 7.
4 H. 7. 8.

Vide 1 Vent. 134. *Simile*.

Per Holt: The true Way is to plead the Pardon generally, and if there be Exception, Attorney General should shew the Party is within it.

Court will take Notice of an Act which concerns the Revenue, if it be to the Interest of it; *aliter* if to the Diminution of it.

Bail-Bond.

Holt. One cannot stay Proceedings upon Bail-Bond till other Bail put in and justified, if excepted against.

Money not brought into Court on a *Quantum meruit*, but in *Assumpsit* may, which will affect the *Quantum meruit*.
3 Lev. 440.

Per eundem: It will be hard to let Money be brought into Court upon a *Quantum meruit*, and thereby to put the Plaintiff to carry on his Suit at the Peril of Costs; but the Way is to confess the Employing, and that he deserved but so much, and to plead a Tender thereof, for then the Plaintiff may reply that he deserved more, and so come to Issue; but because in most Declarations there are *Quantum meruits*, even in an *Indebitat*, there it may be brought in upon the *Indebitat* Count, and that will affect the other, and so it was done.

If Money be as a collateral Security for a Term, it shall be discharged in reasonable Time, unless a Time for its Continuance be fixed.

If Money is to be raised at a certain Time it must be done; but if no Time fixed, and may be raised out of Profits, Sale shall not be.

In my Lord *Cornwallis's* Case in Chancery, which was this: The said Lord, upon his Intermarriage and Settlement of his Estate, raised a Lease for Years to Trustees for the raising of 6000*l.* as he should appoint; 3000*l.* thereof to be at his own absolute Disposal, the other towards Provision for his younger Children; he in his Life-time assigned the said 3000*l.* to Trustees, for a collateral Security of a Lease of ninety nine Years, which he made, and that the said Trust should remain during the Term; he had one younger Child; he by Will taking Notice of the new Trust for the 3000*l.* orders the whole 6000*l.* to be raised within a Year after his Death; and 3000*l.* to be paid to his Executor, in Trust for the said Daughter, and bequeathed her the other 3000*l.* subject to the said collateral Trust. In this Case my Lord Keeper *Wright* said, if the 3000*l.* had been made a collateral Security generally the Court would discharge in reasonable Time, as here in seven Years Time, if the Party did not shew probable Cause of Fear of Eviction, and shew by whom; but this being expressly ordered to continue, they could not do it. 2dly, That if there had been no Time limited for the Raising this Money, and the Lady, to whose Use it was, so young that a speedy Raising of it was not necessary, and that there was a sufficient Estate out of the Profits, whercof it might be raised without Sale; the Court would not in that Case decree a Sale; but here, the Time being expressly fixed, there must be a Sale, rather than it should not be then raised. And so it was decreed; and 3000*l.* to be paid to Executors, and 3000*l.* to the Trustee of the Lessee, to stand his Security, to be laid out at Interest

rest on such Security as Master should approve of, liable to the Lady's Claim, in case there should be no Eviction.

Dominus Rex versus Clark.

Information was filed against him for building of Locks on the River *Thames*, to the Obstruction of Navigation. And *per Holt*: To hinder the Course of a navigable River is against *Magna Charta*, c. 23. and any Thing that aggravates the Fact, tho' not directly to the Issue, may be given in Evidence upon it; as here the taking of Money to let People pass. And it is no Exception to a Witness here, that he contributes to carry on the Suit, or that this publick Nuisance was to his private Nuisance.

Information
for building
Locks on the
River *Thames*.

Blackborough versus Davis.

THE Niece died Intestate, and Administration was committed to the Grandmother; and now *Broderick*, in Behalf of an Aunt, moved for a *Mandamus* to the Spiritual Court to grant it to her, as being, as was pretended, next of Kin, *viz.* a Degree nearer than the Grandmother. And he urged, that in all Cases, except where there are many in equal Degree, where the Ordinary may choose to which of them to commit, he is bound by the Statute to grant it to the next of Kin. And that if he grant it to any other, he goes beyond his Authority, and his Grant is void; and he may, without any Repeal of such Grant, commit it to the right Person; and for this he quoted *Owen* 50. 1 *And.* 303. 2 *Brownl.* 119. And if there be any present Impediment in the next of Kin, as if he be attainted, *Non Compos*, &c. in respect of which Administration may be well granted to the next after him; yet upon Removal of such Incapacity, the Ordinary of Right is to repeal the Administration, and that without any Appeal to a superior Judge, and grant it to the right Person. 1 *Sid.* 373. So if he to whom it is committed become *Non Compos*, or otherwise incapable, he may repeal in like Manner, and grant them to the next of Kin after. 3 *Cro.* 163. *Goldsb.* 119. *Dy.* 369. So since now by the Statute of 21 *H.* 8. it is the Duty of the Ordinary to grant the Administration to the next of Kin, and who such next of Kin is shall be determined by the Common Law, and not by their Law below; and if he does not duly execute

Administra-
tion.
Salk. 38, 251.
S. C.
Whether Ad-
ministration
should be
granted to
the Aunt or
Grandmother.

Vide Raym.

his

his Duty, the only Remedy for the Party grieved is, to apply for Aid to the Temporal Court for the King's Writ to command him to execute his Authority as he ought to do, according to the Statute. And it cannot be objected, that such a *Mandamus* would in Effect be to command a Judge to act contrary to his Judgment, for it is no more than to command them to execute the Statute; and it is one of the Points in the Case in 1 *Sid.* 371. that the Ordinary might repeal or revoke an Administration, and grant it anew.

Sir *B. Showers contra*: They are Judges below of the Proximity of Degrees; for it were absurd to make them Judges of the Matter, and not to allow them to judge it according to their own Law. And there is no Precedent that ever a *Mandamus* went to command them to commit Administration, when they had already granted it; and to say that Administration once committed can in any Case be merely void, is directly against *Packman's Case*, 6 *Co.* 19. And to grant a *Mandamus* here, would be to determine the Right of a third Person without his Privy; for if *Mandamus* should go, and the Judge below will not return, the Truth, here will be a third Person ousted of his Right, without an Opportunity of shewing it.

Holt, C. J. Offley's Case in *Sid.* was an Administration committed to one in equal Degree, pending a Caveat, without Notice of him who had enter'd the Caveat; and an Appeal was brought to repeal it for that Cause, and they below held that a good Cause of Repeal; and this was suggested for a Prohibition here; and on Demurrer the Court were divided, two holding, that it being granted to one next of Kin, the Ordinary had executed his Authority well; but the other two, tho' he has granted it to the right Person, yet it was unduly; so it does not affect this Case one Way or other.

1 Vent. 188.
Proximity of
Degrees must
be according
to the Com-
mon Law.

Vide 13 Co.
4, 5.
Must construe
Acts of Par-
liament accord-
ing to Com-
mon Law.

But here you seem to be too late for a *Mandamus*; it is true the Construction of the Statute upon the Proximity of Degrees must be according to the Common Law; and if they would go against it, your Way would be to come and suggest that they are going to grant it to one more remote, and then move for a Prohibition to hinder them from so doing; and then you might have a *Mandamus* to make them grant it to the next of Kin; nor is it unusual to oblige them to construe Acts of Parliament, which concern even Things of pure Ecclesiastical Consequence according to Common Law, or to prohibit them. For if they should libel to divorce two for Kindred, who

are out of the Degrees, it is very frequent to prohibit them; and yet nothing is more meerly within their Jurisdiction than Marriage, yet because there is an Act of Parliament in the Case, the Construction whereof belongs to the King's Temporal Judges, we prohibit them in such Cases. Now the Granting of Administration, in its Nature, is of Civil Conusance, but allow'd to them by the Custom of *England*; and by that Custom they had a Discretionary Power to grant to whom they would, and to recal it at Will: But here comes an Act of Parliament which takes away this Discretionary Power; and if they do not confine themselves to that Act, they ought to be prohibited. But now you are too late for that; for since they have granted it, we will give so much Credit to them as to believe they have done it rightly; and if they have not done so, it must be undone by Repeal: For since the Statute of 31 *Ed. 3.* the Administrator has as absolute a Property in the Goods as an Executor, who is in by the very Will of the Testator; and your Authorities to the contrary are not Law, for by the Statute of 31 *Ed. 3.* the Ordinary is to grant the Administration to the most foyal and loyal Friends of the Intestate; and nothing is said of the next of Kin till the Statute of *H. 8.* and that commands him to grant it to the next of Kin, requiring the same; but neither Statute does incapacitate him to grant it to any other, only commands him to grant it to next of Kin, &c. And if the Statute had deprived him of the Power of granting to any other than to next of Kin, then the Grant to any other would be meerly void; and consequently Trover would lie against Vendee of such Administrator by the next of Kin after Administration granted to him, and that it does not, the Authority of *Packman's Case* is in Point. And suppose the next of Kin does not ask for it, must not the Ordinary commit it to another, or to the principal Creditor? And if after the next of Kin ask it, and the Administration committed to the principal Creditor is repeal'd, and granted to the next of Kin, the principal Creditor may retain any Debt in equal Degree; and all the Dispositions made by him before the Repeal shall stand. But if one who has no Jurisdiction commit Administration, it is void, and Sale under such Administration alters no Property, but is utterly void; but there is no manner of Authority; but here is one, tho' limited. And since you stay'd till Administration committed, your Way was to appeal, and that would have let you in; but now you have past the fourteen Days, you have laps'd your Time. And here at last

Vide 3 Inst.
43. acc.

By Custom of
England
might have
granted Ad-
ministration
to whom they
would.

If Administra-
tion be grant-
ed to a wrong
Person, must
be undone by
Repeal.

Hob. 83, 191.
Noy 24.

1 Cro. 62.
63, 201, 202.
Ante p. 206.
Administrator
has as absolute
a Property as
Executor in
Goods.

If Administra-
tion be granted
to one not next
of Kin, it is
not void; and
all Acts done
by him before
Repeal are
good.

But where a
Person who
has not Juris-
diction com-
mits it, it is
void.

2 Lev. 90.

the Court directed them to bring a Citation below, to repeal the Administration; and if Judgment be given against you in that you may appeal; but still such Appeal suspends only the Sentence upon the Citation, and still the Administration remains in Force; and the Administrator may by Virtue thereof dispose of all the Goods in the mean Time; and so, *per Gould*, it was adjudg'd in a Case between *Sims* and *Sims* in *Hale's* Time. And *per omnes*, There is no Colour for a *Mandamus* till something be pending below, and that now can only be by Citation; and if the Nature of the Thing will bear it, it may then be granted.

Administration granted to one more remote of Kindred is only avoidable by Repeal. If the Ordinary grant it to another, and the first be after repeal'd, from thenceforth the second is good.

Wife and Father in equal Degree as to Administration. Husband to have Administration of the Wife.

And it was said by the C. J. that after Administration committed, in no case could the Ordinary compel Distribution; and for that the Statute of Distribution was made, and since the Statute of *Ed. 3.* the Ordinary is not answerable for any Misdemeanor of the Administrator, as he was before that Statute; which shews he is no more his Servant, and has no more to do with him; and that Administration committed to one more remote in Kindred, is not avoidable but by Repeal, *vide Hetly* 48. But if the Ordinary, without Repeal of the first, should grant it to another, and then the first is repealed, from thenceforward the second is good. *Vide Sir John Nedham's Case*, 8 Co. And they all held that if there be two in equal Degree, the Ordinary has his Election who to grant Administration to. And *Holt* remember'd *Sir G. Sand's Case*, who took out Administration for his Son; and after, a Woman pretending to be the Son's Wife, would have it repeal'd; and there, upon Motion for Prohibition, here it was held the Ordinary, by committing it to the Father, had executed his Authority, for he had Election which of them to grant it to. As also the Case of *Duncomb v. Lacy*, which was after it in the common B. A Feme Covert had several Debts due to her before Marriage, which the Law did not give to her Husband; she dies, and her next of Kin comes and takes out Administration, the Husband sues to have it repeal'd, and a Prohibition is moved for, and granted; and all this appearing on the Declaration, it was held the Prohibition should not stand, but the Husband ought to have the Administration. Ad *Sir George Sand's Case* was held to be good Law, for it differ'd from this; for by the Statute of 31 *Ed. 3.* the Husband ought to have Administration preferably to any body; and is not within the Statute of *H. 8.* because the Husband is the best Friend the Wife can have; and it was also held, that a Residuary Legatee is to have Administration before the next

of Kin, because it appears, that the Intestate, by making him Residuary Legatee, took him to be his best Friend; but the reason why the Wife shall not have Administration of her Husband preferably to his Father is, because she may marry, and so put herself and the Goods in the Power of another.

Vide 1 Vent.
217, 218,
219.
Residuary Le-
gatee prefer-
able to next of
Kin.

And as to the main Point, they all agreed at another Day, when the Case was moved again, and a Citation pending below, that there was no Room for a *Mandamus* to prefer the Aunt; and that she could by no means be said nearer of Kin than the Grandmother; and suppose them in equal Degree, one being in the right Line ought to be prefer'd to the other being in the collateral; *per Holt*. And *per Iuy*, The Relation between Grandaughter and Grandmother, and Niece and Aunt are equal; and all the Difference is, that one is lineal, and the other collateral, and they are likewise mutual Relations: And in Pleading, if the Son will make himself Heir to the Uncle, he must shew *coment*, and make the Father a *Medium*; that is, that Inheritance descends to him *ut consanguineo et heredi, viz.* Son of such a one, who is Brother and Heir to the Uncle. And so in Case of Descent from the Grandfather, you must do it in like manner by the Father; that it descends to him *ut consanguineo et heredi, viz.* as Son and Heir to the Father, who is Son and Heir to the Grandfather. But Brother and Sister are in an immediate Degree to one another, and for that need not mention the Father in making Title to each other; and for this he quoted the great Case of *Foster and Ramsay* in the Exchequer. Two Sons of an Alien, born in *England*, one of them dies, the other shall be his Heir, and making Title he need not mention the Father. But tho' Brothers are in the same Degree among themselves, they are not so as to a third Person; for if so, in case Administration had been committed to the Aunt it should not be revok'd, to have it granted to the Mother; this was all in *Easter* and *Trinity Term* last. And in *Mich. Term* they moved for a *Mandamus* to have Distribution; and to have it *Broderick* urged the Words of the Statute, which ordains a Distribution to the next of Kin to the Intestate in equal Degree; and they will not controvert, but the Aunt and Grandmother are in equal Degree to the Niece. And it is plain they do not go according to the Civil Law, for by the *Nov. 118, 127. of Justin* there ought to be Distribution between the Father and Brother and Sister of Intestate, and they never allow'd of any before the Statute. And we are but two

Aunt is not
nearer of Kin
than Grand-
mother, who
being in the
right Line is
to be prefer'd.

Brother and
Sister are in
an immediate
Degree, and
in making
Title to each
other need not
mention the
Father.

2 Jon. 10.
Vaug. 274.
2 Vent. 1.

Whether
Niece intitled
to Distribution
with the
Grandmo-
ther.

De-

Degrees removed from the Intestate, and so distant is the Grandmother.

To which it was objected, first by Sir *B. Shower* and *Cheshire*, Common Law Counsel, That the Statute of Distribution was only made to quiet the Ordinary in his Right of ordering a Distribution, which undoubtedly did belong to him, and was exercised by him before the Statute of 31 *Ed. 3.* and which he did continually claim; and according to the Opinions of some eminent Common Lawyers, remain'd in him notwithstanding the Statute. And since before the Statute they were the sole Judges who ought to have Distribution, and the new Statute impowers them to order a Distribution, it seems very plain the Statute leaves it to them to judge who ought to have Distribution; for it says it shall be according to the Law in that Case used, and that must be the Law which they below did use to go by, and by their Law the Grandmother is nearer of Kin than the Aunt; or if it be not so, and it be adjudged so, the Remedy is by Appeal to a superior Court; for the Distribution of Intestate's Estate was always of Ecclesiastical Conusance before 31 *Ed. 3.* — whereby the Property of the Administrator is become absolute, subject to Debts in their Degrees, but exempt, according to the general Opinion of the Common Lawyers, of any Distribution. And the new Statute, making them liable to Distribution, does only restore Things as they were; and a *Mandamus* to grant Distribution to the Aunt, were expressly to oust the Judge below of the Jurisdiction the Statute entrusts him with, *viz.* that of judging who is intitled to Distribution; that is, of judging what are the next Degrees, and next, who are in those Degrees. The reason of a *Mandamus* is, that this Court, in respect of its Superintendency over all other inferior Jurisdictions, is to see that they execute that Jurisdiction that they are intrusted with; and therefore a *Mandamus* to grant Distribution to the next of Kin generally, perhaps may lie, but never to do this or that particular Thing; for that would directly oust them of the Conusance and Right of judging whether the Party be intitled to the Thing or not; for if they should judge not, and make that Return to a *Mandamus*, then the Party might bring his Action of False Return against them, and the subject Matter of their Judgment below would be determin'd incidently here above; and if it should be judged contrary to their Judgment here above, a peremptory *Mandamus* would go; and so farewell their Power of judging.

And since the Statute of Distribution, Administrator and next of Kin is like Executor and Legatee, or rather they are Executor and Legatee in Law. If therefore they shall judge who is made Legatee in a Will, and direct how a Legacy shall be paid, without any particular *Mandamus* of this Court; why may they not *a pari* judge who shall come in under the Description of next a Kin. And if the *Mandamus* should go, and they return that the Grandmother is nearer of Kin than the Aunt, would an Attachment go against them for not obeying the Writ, contrary to their Judgment grounded upon their Law, which alone they are to be guided by, as knowing no other? And it never was heard of, that a Judge intrusted with any Judicial Power was commanded to eat up his Words, and proceed against his Judgment; there are Multitudes of Precedents of Appeals in such Cases, but not one of either *Mandamus* or Prohibition; and that is Evidence that hitherto Appeals have been thought the sole Remedy. And by the Civil Law the ascending and descending Lines are always held nearer than Collaterals: And this Absurdity that would follow, to make Judges pronounce against their own Judgments, is the Reason that upon a Writ of Error the superior Court does reverse Judgments of inferior Courts, and give new Judgments, if the Nature of the Thing requires it. Indeed if they would proceed below to award Distribution to one not intitled, there might be some Colour for a Prohibition, but where a Judge below is to give Judgment; and it is not yet known which way he will judge, to command him beforehand to do his Duty, is very odd.

And Dr. Lane, a Civilian, said that if the Father and Mother of the Intestate were living, they would be in equal Degree; and by the Civil Law, upon Death of Father the Grandfather becomes Father in his stead: And the Computation of Degrees according to the Canon Law, was never received in *England* in respect to Succession, but only in respect to Degrees of Marriage; and he agreed, that according to the Canon Law the Aunt and Niece were in the second Degree, as well as the Grandmother and Niece; and the Reason he said was, because the Clergy who made the Canons, considering the Gain of dispensing with Marriages within the four Degrees, took care to make People as near a Kin as they could, and so contracted the Degrees; but that according to the Civil Law the Aunt and Niece were in the third Degree, and the Grandmother and Niece but in the second Degree. And before the Novels of *Justin. Nov.*

118, 127. the Mother was to be preferr'd before Brother or Sister; and so should the Grandmother, if the Mother were dead, because she then was *in loco parentis*; but the Severity of that Law is corrected by those Novels, and the Brother and Sister let in in Concurrence with the Mother; and if the Grandmother be in the second Degree, sure the Grandmother's Daughter must be a Degree farther. And he said, here in *England* the ancient Civil Law being planted by the *Romans*, and the Novels of *Justinian* not being found in the West till the thirteenth Century, they never obtained in *England*. And the Statute says *pro suo cuique jure*, and what *Jus* is that, certainly it is the Law by which we judge in Point of Succession, and that is the old Civil Law; and by the Civil Law Brothers are in the second Degree, for there is an Ascent to the Parent of one Side, and a Descent from him to the Brother; so here there will be an Ascent from the Niece to her Mother, and that is one Degree, and from the Mother to the Grandmother a second Degree, and from the Grandmother to the Aunt three Degrees.

Before the Statute of *Ja. 2.* If there were Father and Mother having many Children, and the eldest of the Children had died intestate, the Father or Mother should have had Administration, and ran away with all the Estate, and leave the Brothers and Sisters nothing; but now by that Statute the Brothers and Sisters are let into a Distribution with the Mother, but not with the Father, for he shall even at this Day run away with all.

Admini-
stration
is to be
committed
to
Father or
Mother
preferable
to Brother
or
Sister.

So Grand-
mother
nearer to
Niece than
Aunt.

Holt, C. J. By our Law Administration is to be committed to Father or Mother of the Intestate before his Brother or Sister, and that is the Reason of *Ratcliff's Case*; and it is because the Child proceeds immediately from the Parent, and is otherwise of no Kin to Brother and Sister than as they proceed from the Parent; and if then the Mother be nearer of Kin than the Sister, by 21 *H. 8.* she ought to have the Preference of Administration; and by the same Reason that the Mother is nearer than the Sister, the Grandmother, being nearer to the Mother than her own Sister, the Grandmother must be nearer to the Niece than the Aunt: And the Words (next of Kin) in the Statute of *Ja. 2.* shall be construed in like manner as in that of *H. 8.* Before 31 *Ed. 3.* the Ordinary was universal Administrator of all the Intestates of his Diocese, and then they did distribute to the Friends of the Intestate as they thought convenient, and some to holy Church; and tho' since that Statute they have frequently claimed such a Right, yet they were constantly prohibited.

And

And he said, that sure the Brother and Sister of the Deceas'd must come in before the Grandmother, and the Aunt before the great Grandmother: And if Administration were granted to the Aunt, and they went about to repeal it below, in order to grant it to the great Grandmother, it were fit to prohibit them; for by the Statute they are bound to confine themselves to Degrees. And there are no Precedents of Distribution granted beyond Children of Brothers or Sisters; and neither Civil nor Canon Law, as such, are of any Authority in *England*, but what gives them Force, is their being received and acquiesced under here. And sometimes in the Ecclesiastical Courts they practice against the Civil Law, as in Suits against Parishioners to repair the Church; for of common Right, and by the Civil Law, the Parson ought to do it.

Brother and Sister nearer than Grandmother, and Aunt nearer than Great Grandmother.

And now this Term he deliver'd the Opinion of the Court thus: We all hold it clear Law that this Point must be determin'd by the Law of the Realm, and not by any Civil or Canon Law whatsoever. So we shall go upon the ancient Laws and Customs of *England*; and in order to that we must consider what the ancient Laws and Customs of *England* were before, and at the Time of the Conquest. And it appears, that by the Law then used in *England*, all the Descendants of a Person dying intestate had Preference not only in Personal but also in Real Estates; for if a Man had died, having three Sons and a Daughter, they all equally inherited his Real Estate; and this appears in *Seld. Eadm.* 184. *Lamb. Saxon Law* 66. *Siquis intestat' decesserit liberi ejus hereditatem aequaliter dividunto.* But after the Conquest, the Kingdom and Constitution were to be new modell'd; and this Alteration was made in the Time of *Henry I.* and then the Daughters were excluded if there were Males; and it was by the 36 Law of *H. I.* *Vide Lamb.* 202, 203. and then the Males did inherit all alike, especially all the common Socage Men. But even then, if one had died without Issue, and had a Father or Mother, the Land should not go to any Collateral, but to his Father or Mother; and this appears by the Law of *H. I.* *Lamb. ubi supra.* *Siquis sine liberis decesserit, Pater aut Mater in hereditatem succedat, vel Frater aut Soror, si Pater et Mater desit;* so the Collateral was not to come in but upon Failure of Father or Mother. And where *1 Inst.* 11. a. this is taken Notice of as an exploded Opinion; but *Coke* had not seen the Laws of *H. I.* then; and the red Book in the Chequer, that he

Vide Hob. 83, &c. Right of Administration to be determin'd by the Law of the Land, and not by Civil or Canon Law.

By the old Law of *England*, all the Children, whether Male or Female, equally inherited.

In *H. I.* Time the Daughters were excluded, if there were Males. And if had no Children, had gone to the Father or Mother.

he contradicts, is very ancient, and of great Authority in Law.

Between the
Reigns of H.
1. and H. 2.
the Father
and Mother
were excluded,
and to go to
Collaterals;
but this Al-
teration was
only as to real
Estate.

But this Law did not continue long, but was alter'd between the Reigns of H. 1. & H. 2. and the Father and Mother altogether excluded; and then the Law came to be adjudged as it is to this Day, that Land should not ascend to Father or Mother, but rather go to Collaterals; and this appears by *Glanvill, lib. 7. 1, 2, 3, 4. c. —*. But this Alteration was only made as to real Estates; and personal Estates were left as they were; and Father and Mother, as to that, have Preference to Brother or Sister of the Intestates, and all other Relations whatever, except the Descendants of him; and it is plain that this remains so still, for that nothing appears in the Books of any Alteration made in this Point: So the Law being so then, and not being altered since, but only as to Inheritance, it must consequently remain so still; and therefore the Father and Mother of the Intestate are to be preferred before Brother and Sister; and by same Parity of Reason, the Grandfather and Grandmother are to be preferred before Uncle and Aunt.

Now as to the Authenticks of *Justinian, Nov. 112. c. 2.* that the Brother and Sister should come in for Distribution with the Father of the Intestate; it is true, such a Law was made in the later End of *Justinian's* Reign, and introduced and establish'd pursuant to the Practice in the Prætorian Court; and the Law there is, that if one should die Intestate, his Estate should go to his Parents, excluding all others, except Brother and Sister *ex utroque parente*; but if there were no such Brother or Sister, then that it should go altogether to the Father or Mother; and by that Law, only Brothers and Sisters come in for a Distribution; but by the express Words of it all others are excluded; and the Grandfather, and all those above, should come in before any in the collateral Line. But I believe it will be hard to maintain that Doctrine now; because the Statute of Distribution gives it to next a-kin, and the Great Grandfather is not so near as Uncle; but sure the Grandfather and Grandmother is nearer, because the Uncle and Nephew, or Aunt and Nephew, or Niece, are not otherwise a-kin, but as they derive their Relation from Grandfather and Grandmother; and *per quod unumquodque est tale, illud est magis tale*, and therefore they are not now in equal Degrees; and there is something of greater Difference between them than the one's being lineal and the other collateral.

It may be said, that this is against the Rule given to the *Israelites* in the xxvii. Chapter of *Numb.* v. 8, 9, 10. where it is directed, that if a Man dies, having no Son, his Daughters be his Heir; if there should be no Daughters, his Brothers; if no Brothers, his Father's Brothers; so one would think the Father is left out on Purpose. But in Fact it was quite otherwise; for notwithstanding any Omission there, if one had died having no Issue, but had a Brother and a Father, the Father should inherit to his Son; and so is *Selden de Successionibus apud Hebræos c. 12.* And it is true, there is no Mention in that Law of the Father, but by the constant Practice the Father came in before his Brother, but the Mother by that Law never came in.

And this Case is not within the Reason of *Justin's Novels* before-mentioned; and admit it were, nothing of the Civil Law is admitted or obligatory here in *England*, *quatenus* it is the Civil Law; but if it be of any Force here, it is because it was antiently received here in *England*; and this Law could not be received here antiently. The Books of *Justinian* were made between 500 or 600 Years after *Christ*, and were received for Laws during forty Years after their making, and practised in all the *Eastern Empire*; his *Pan-dects* were in *Latin*, as the *Roman Law* was, but the Authenticks were in *Greek*. And after *Justinian* the 2. and *Maurice* the Emperor, they were rejected for 200 Years till *Basilick* the Emperor, who laid them altogether aside, and made a new Book of his own, called the *Basilick* from his own Name, which were in Force till the taking of *Constantinople* by *Mahomet* the Great; so that till the Year 1453. they were neglected in the *Eastern Empire*. In the Year 1125. they were found by *Lothaire* the 2. at the Siege of *Amalcarr*, and till then were not heard of in the *Western Empire*; nor was it possible they could, for it was for all that Time over-run with the *Goths* and *Vandals*. And presently after they were found at *Amalcarr*, they were sent to the University of *Boulogn* to be taught. *Vide Seld.* 497. and his Notes upon *Fortescue* 11, 12. and *Dr. Duck's Use of the Civil Law*, *Lib. 1. c. 6.* So that *Henry* the first beginning his Reign in *England* in the Year 1100. and these Laws being found in the Year 1125. could not be of Force in *England* in his Time. But this seems grounded upon the *Jewish Law*, tho' the said xxvii. of *Numbers* may seem somewhat to the contrary; but in the Case there put the Father and Grandfather were dead. So that since there has been such an old Practice to let in the Father and Grandmother, pre-

The Novels
of *Justinian*
not in Force
H. 1.'s Time,
not being then
found.

ferable to Uncle or Aunt; and that this is grounded upon antient Authority, which are more apparent by Books printed of late Years; as Sir Roger *Twifden's* Laws of *H. 1.* and the *Decem Scriptores*. It is fit there should be no Diversity in this Case; & *sic annuente reliqua Cur'*, It was ruled that no *Mandamus* should go.

Dominus Rex versus Bishop.

Ante 544.
On Reversal
of Outlawry
Scire fac' must
go against all
the Lords me-
diate and im-
mediate, or
Attorney Ge-
neral confess
he had no
Lands.

HE was outlawed for Murder, and having brought a Writ of Error, he removed himself by *Habeas Corpus* from *Newgate*; and being asked what he had to say why Execution should not be awarded against him, he prayed an Allowance of his Writ of Error, and it was allowed; and then he prayed a *Sci' fa'* against all the Lords mediate and immediate; and because the Term was so far spent, that he could not have it returnable till the next, the Court told him, that if he got the Attorney General to confess that he had no Lands, &c. it would suffice; and he was committed to Marshal.

Crow versus Mason.

A Declaration
of *Michaelmas*
Term, Defen-
dant pleads
Payment as to
Part since the
last Continu-
ance; Plaintiff
demurs; it is
a Discontinu-
ance.

DEBT upon a Bond, Defendant pleads in Bar as to Part, that after the last Continuance he had paid so much, which the Plaintiff accepted; to which the Plaintiff demurs; and it being a Declaration of *Michaelmas* Term, it was adjudged the whole was discontinued; for the Plaintiff's Way had been to demur to the Plea, so far as it was pleaded, as he had Cause to do, it being after last Continuance, and no Acquittance pleaded or produced, and take Judgment by *Nil dicit* as to the rest. *Per Cur'*.

Dominus Rex versus Clerk.

In Informa-
tion for Nu-
fance, by
Consent Jury
to have View.

IN Information for a publick Nufance, the Jury found the Defendant guilty; yet because it appeared to the Court to be doubtful upon the Evidence, and that the Jury had not had the View, tho' very proper in this Case, they wish'd the Parties to consent to let this Jury have the View, and to come to Trial again; and it was so done by Consent. And this the Court did because it was a Question of Right, and this Trial would be peremptory to the Defendant.

Dominus Rex versus Plummer.

Indictment for Murder, and a special Verdict; Eight Persons having a Design to transport great Quantities of Wool contrary to Law, were with Horses laden with the said Wool, on their Way towards the Sea-side; at twelve of the Clock at Night, the King's Officers duly appointed, having Notice thereof, in order to seize the Wool and apprehend the said eight Persons, came and way-laid them in a certain Lane through which they were to pass, and hearing them coming, gave the Word of Seizure; whereupon one of the said eight Persons, having a Fusée laden with Powder and Ball in his Hand, fired it off and kills J. S. one of his own Gang, viz. one of the said eight Persons; the Defendant was one of said eight Persons, and present at the Discharging of the said Fusée; and the Question was, whether it be Murder in him. And the Chief Justice declared, that for as much as this Case seemed of very great Consequence, it had been for two Vacations under the Consideration of all the Judges of *England*, before whom it had been several Times argued at *Serjeants-Inn* in *Chancery-lane*; and that upon very great Deliberation they had all unanimously resolved, that it is not Murder in him. And now he openly in Court declared the Reasons of their Resolution, to this Effect:

Several Persons being met to do an unlawful Act, one fires a Gun and kills one of his own Party, it is not Murder.

First, It is to be considered, that it does not appear any where in the Verdict, that the Person who did shoot off the Fusée did shoot it against any of the King's Officers, for if that had been found, it had been Murder in them all; but that being not found we cannot intend it; tho' upon the Circumstances of the Evidence, as it did appear, there was enough for the Jury to have found such a Verdict. For *first*, they were doing an unlawful Act. *2dly*, They were armed. *3dly*, It was late at Night, and the Fusée was discharged upon the Word of Seizing's being given; and it cannot be easily thought that it was discharged upon one of their own Gang, and not against the King's Officers, upon this Evidence, and these Circumstances. But this is Matter of Evidence for a Jury to find the Fact, and not for Judges to intend it here upon a special Verdict; and therefore, tho' it might be a good Foundation for a Verdict, it cannot be so for an Intendment. For in a special Verdict, whereby any Man is to be charged or hurt, or convicted, tho' Jury find Matter of Evidence enough for them to find the Fact, and give

If it had been found he had shot at any of the King's Officers, it had been Murder.

Fact it self must be found, not Evidence of it.

Verdict

Verdict against him, yet if they do not find the Fact, I lay such Matter tho' pregnant Evidence, yet it cannot be enough to impower the Judge to intend the Fact, or condemn him as guilty of it. And so here, though there be great Evidence to prove that the Fussee was discharged against the King's Officer; yet because it is possible it might be by Chance, or other Misfortune, we must rather intend it to have been fired upon some other Occasion, than against the King's Officer.

Secondly, So there be two Things to be considered in this Case. *1st*, The Fussee's not being shot off against the King's Officers, but rather upon some other Account, what Crime is it in him that discharged it? *2dly*, If it be Murder in him that did shoot it, it will be fit to be known what Crime it will be in them who were present of his Side, and how far they will be concerned in it?

Nota.
If a Man
shoots intend-
ing to kill one
Man, kills an-
other, it is
Murder.

1st, It is plain, that he, that did discharge it, and all the rest were engaged in an unlawful Act and Design; and if he, in Pursuance of that, discharged the Fussee, tho' he had not kill'd the Person intended, but another, the Offence would be in the same Degree as if he had kill'd the Person he intended to kill. *Vide Dy. 128. pl. 16. Crompt. 101. pl. 474. 9 Co. 91.*

In Indictment
of Manslaugh-
ter, it is ne-
cessary to lay
it done volun-
tarily; yet if
the Act be
found, it shall
be intended
voluntarily,
being done by
Man, a free
Agent.

Now then, since we cannot take it for granted, that he did discharge this Fussee against any of the *King's Officers, or other Person*, what Offence will this Act be in him that did it? And, as it does appear, it can be no more than Manslaughter in him. And here it was doubted by some, whether it might not be intended that he did it by Accident. But *per Holt*; That cannot be intended; for tho' in an Indictment of Manslaughter, *it be necessary to say that it was done voluntarily*, yet it is not necessary it should be so found in a special Verdict; for if it be found that he did the Act, without any more, it must be understood that he did it voluntarily, as it is laid in the Indictment, if the contrary do not appear; for Man is a free Agent, and what he does must be intended to be done voluntarily, if the contrary does not appear. And in all Cases where a Man is indicted of Murder or Manslaughter, if it appear on Evidence, that the Fact was done by Misfortune, *it must be so found specially by the Jury*. And if it be not so found specially, but that he kill'd generally, it must be intended that he did it *with his Will*. And consequently it must be intended that this Act in Question was done *voluntarily*, and therefore, as the Case is, it must be Manslaughter.

But suppose it had been found by the Jury, that the Man who discharged the Fusce did it of Malice prepenſe, and thereby one of his one Gang is kill'd, it could not affect any of the reſt, as this Caſe is; for tho' they are all engaged in an unlawful Act and Deſign, and that the general Notion be, that when two are engaged in an unlawful Act, and that by the Act of one a Man is killed, it will be Murder in the other; tho' he has done nothing, yet his being originally engaged in the unlawful Act, it makes him guilty of Murder. And this, it is true, is a general received Opinion, but it has ſeveral Qualifications and Limitations.

In general, if two are engaged in an unlawful Act, and a Man is kill'd by one, the other is guilty of Murder.

1^{ſt}, To make one an Abettor in ſuch a Caſe, it is neceſſary he ſhould know of the malicious Deſign, that is, that it was unlawful; for if he be ignorant of the Deſign, tho' he be engaged in the unlawful Act foreign from the Deſign, he ſhall not be guilty of Murder. For it is poſſible, that if divers Perſons be engaged in an unlawful Act, that one of them may have a particular Malice againſt another of them, and the reſt know nothing of it; and his taking the Opportunity of putting that Malice in Execution, when he and others are engaged in an unlawful Act, cannot make the reſt guilty; for it would be extream hard to make any of the reſt an Abettor to a collateral Act, to the Malice whereof they were no way privy. *Vide 14 Jac. Hale Tit. Murder, pl. 101.*

But to make it ſo, he ſhould know of that malicious Deſign different from that engaged in, elſe it is not Murder.

Cromp. 23. A. has Malice to B. and engages in a Duel with him, C. a Stranger comes by Chance and ſides with A. and A. kills B. this is Murder in A. and C. who was preſent abetting and aſſiſting, is only guilty of Manſlaughter: Why? Be cauſe he came there of a Sudden, and knew nothing of the premeditated Malice; ſo, tho' it was not warrantable for him to meddle in the Quarrel, yet be cauſe of his Ignorance of the Malice, he was only guilty of the Manſlaughter. If a Company of Thieves go upon a Deſign to rob a Houſe, or to rob on the Highway, and two of them quarrel, and one kills the other, and that there was no Malice prepenſe, but a ſudden Quarrel, it is only Manſlaughter in him, and no Crime at all in his Companions, tho' they were all engaged in an unlawful Act.

A. has Malice to B. C. a Stranger comes in by Chance and ſides with A. who kills B. it is not Murder in C.

If Thieves go to rob, and quarrel, and one of them is kill'd, it is not Murder in the reſt.

And he quoted a Caſe which happened on Evidence at the *Old Baily* in *December 1664.* The Secretary of State made his Warrant to apprehend divers ſuſpected Perſons, directed to the Meſſengers; the Meſſengers having Notice of their being in ſuch a Houſe, took ſeveral Soldiers with them to aſſiſt them to apprehend the ſaid Perſons, but took no Civil Officer with them, neither did they make any Demand to have the Door open, as they ought by Law to do, but broke

Persons join'd
to break open
a Door with-
out Warrant,
some commit
Robbery, it is
not Robbery
in all, because
did not know
the Intent.

The Act of
one, whereby
Death follows,
must be in Pur-
suance of the
original un-
lawful Act.

Vide Sav. 67.

If several go
into a Park to
hunt where
they have no
Right, and two
quarrel, and
one is kill'd, it
is only Man-
slaughter;
because the
Killing was
not in Pursu-
ance of the un-
lawful Design.

Where divers
are concerned
in a Riot, and
one is kill'd,
it will be Mur-
der in all.

open the Door, and when they had broke open the Door, some of the Soldiers fell a Plundering, and stole away some Goods; and the Question was, whether this were Felony in them all? That they were all engaged in an unlawful Act is plain, for they could not justify breaking a Man's House, without making Demand first; and in that Case all those who were not privy to the Stealing were acquitted, notwithstanding their being originally engaged in one unlawful Act of breaking the Door; and the Reason was, because they knew not of any such Intent, but it was a chance Opportunity of Stealing, whereupon some of them did lay Hands.

2dly, The Act of one, whereby Death doth ensue, must be in Pursuance of the original unlawful Act. Now in the principal Case, it does not appear that *J. S. was kill'd in Pursuance of the original unlawful Act*, but that another took this Opportunity to kill him: Divers come to hunt in a Park, and the Keeper comes and commands them to stand, and would arrest one of them, and they resist, and one of them in the Scuffle kills the other, it is Murder in them all; because they were doing an unlawful Act, and would not stand but resisted, and in Pursuance of that unlawful Act a Man was kill'd. 2 *Rol. Rep.* 120. *Palm.* 30. and the Lord *Dacre's Case* in *More*. But if divers had come into a Park to hunt, where they have no Right to hunt, and immediately after two of them quarrel, and one of them kills the other, it is only Manslaughter in him that kills, and no Offence in the rest; because the Killing was not in Pursuance of the unlawful Act that they were all engaged in. And it might be in this Case, that he that did kill *J. S.* had a private Grudge to him, and took this Opportunity of putting it in Execution; and there was some Evidence, that the Man that kill'd *J. S.* here did suspect him to have discovered the Design, and thereupon kill'd him, and this perhaps the rest knew nothing of; and it would be very severe, that they, who were not privy to that Malice, should be guilty, if the Knowledge of this Malice lay hid in the Breast of him who did the Act. Wherever divers are concerned in a Riot, or other unlawful Act, and in carrying it on, one is kill'd, tho' it be by Chance, it will be Murder in all. *Dy.* 128. Divers Persons came to force away Goods out of a Man's House, by Colour of an Authority of the Lord Admiral, and would break into the House, and a Woman, who was coming out of the House, was kill'd by a Stone flung by one of the Aggressors at one of those that made Opposition; and it was Murder in them all, by the better Opinion; and we all hold the Law to be so:

And in the End of that Case this Case is put: *A.* and *C.* are fighting a Duel, and *B.* comes to part them, *A.* kills *B.* it is agreed to be Murder in *A.* and some held it to be so in *C.* too, tho' he did nothing; but the better Opinion is, that it is not Murder in *C.* tho' he was present doing an unlawful Act, but he did not oppose *B.* as *A.* did, and killed *B.* because he would not let him kill another; and yet in that Case *C.* had as much a murderous Intent as *A.* had, tho' not to kill *B.* for *A.* and *C.* had a reciprocal Malice against one another.

The third Qualification to the Rule is, that the unlawful Act ought to be deliberate, for if it be done of a sudden, the Death occasion'd by Pursuance of it will not amount to Murder.

The unlawful Act ought to be deliberate.

As suppose a sudden Quarrel happens between several Persons, whereby the Peace is broke, and a Constable comes to part them, and they continue on for a Time, and will not obey the Constable, and the Constable is killed in the Fray; yet if they did not know that he was a Constable, and that he came to keep the Peace, so that they might take Notice of the Occasion of his coming, it will be but Manslaughter in him that kills, and no Offence in the rest. And so it was resolved at the *Old-Baily*, at the Sessions after *Hill. Term.* 19 *Ca.* 2. in one *Thomson's* Case; he and his Wife fell out, and were fighting, the Landlord where they lodged came to part them, and to keep the Peace; *Thomson* with great Force takes him and flung him upon an Iron Bar that stood in the Chimney, and broke his Rib, whereof he died; and it was held to be but Manslaughter, because, that tho' he was doing an unlawful Act, and that the Landlord, or any other, had as much Authority to keep the Peace, as if he actually were a Constable; and the killing of one who comes to command the Peace, tho' he be no Constable, is as much Murder as to kill a Constable; and that if he had declared that he was come to keep the Peace, and commanded them to keep the Peace, whereby they might take Notice of the Cause of his coming, and notwithstanding that they had killed him, it would be Murder; yet this not being so, it was only Manslaughter, because the original Quarrel was sudden.

If on a Fray Constable is kill'd in Execution of his Duty, if he is not known to be a Constable, it is not Murder.

But if it had been a deliberate Riot, whether he knew him to be a Constable or not, or that he came to keep the Peace or not, if he kill any body whatever that resists him, it will be Murder in him, and all that join with him in the deliberate Act. 2 *Ro. Rep.* 460. In an Appeal of Murder by *Clement* against *Blunt*, the Case was, *A.* and *B.* quarrel about a Dog, which *A.* had promised to *B.* but after re-

If a Person who declares he comes to keep the Peace be killed, it is Murder.

If in a deliberate Riot, without such Declaration, it is Murder if the Man be killed.

fused

fused to give him; upon which *B.* goes home for his Sword, and comes back to the Place where *A.* was, and understanding that he was gone home, he follows him home, and demands the Dog, and would come into his House to search for the Dog, and *A.* refuses him Entrance, and the other presses in, and being opposed, in the Scuffle kills *A.* and it was held here at the Bar to be only Manslaughter; yet *B.* was doing an unlawful Act, *viz.* entring into a Man's House against his Will, and *A.* was killed in pursuance of such unlawful Act; and the only Reason of that Resolution must be, because the unlawful Act in which *B.* was concern'd, was a sudden one, and without Deliberation. And *Hale's Pl. Cor.* 51, 57. insists very much upon it, that the unlawful Act must be with Deliberation, otherwise the Killing cannot be Murder.

The deliberate Act ought to be to do Hurt to somebody.

In the fourth Place: As the unlawful Act ought to be with Deliberation, so it ought to do Hurt to somebody, either immediately or consequentially, otherwise the Killing will not be Murder. *Dalt.* 218. *Br. Cor.* 171. *Stamf.* 40. *Hale* 51, 57. That the unlawful Act must be deliberate, and mediately or immediately tending to hurt somebody. A Man goes to shoot a Deer in another Man's Park, and the Arrow striking against a Tree, glances and kills a Man; it can be no more than Manslaughter, tho' 3 *Inst.* 56, 57. be to the contrary, because it is an unlawful Act.

If it be with an Intent to do a felonious Act, tho' not against a Person, it is Murder.

In the fifth Place: It is fit to be known, in relation to that Rule, that it must be a deliberate unlawful Act, tending mediately or immediately to the Hurt of some Person; what if it do not tend to hurt any Person? yet if it be unlawful it will be Manslaughter. Again, tho' it be not with Design to hurt any Person, yet if it be such an unlawful Act as is Felony, or carried on with a felonious Intent, and in Pursuance of such Act a Man is kill'd, such Killing is Murder, not only in him by whose Hand the Person falls, but also in all those concern'd in the felonious Intent. As if divers agree to rob a House, and some of them are placed in a Passage leading to the House to watch for the rest, and the others go to rob the House; and a Person happens to come by, who is stopped by those placed in the Passage, and in the Scuffle is killed by one of them, and no Robbery is committed; yet this will be Murder in all those that were by then, and likewise in all those that went to rob the House, and were not actually present. 3 *Inst.* 56. A Man goes to shoot another Man's Hen, and chances to kill a Man, it is Murder says the Book, but that must be intended that he

shot

shot the Hen with Intent to steal it; and then because a felonious Intent was at Bottom it will be Murder, otherwise that Case cannot be Law.

So first we all agree, that tho' the Person, that shot off this Fusée, did it with Intent to kill *I. S.* out of a premeditated Malice he had against him; yet such as did not know of such Design, tho' present at the Time, and engaged in an unlawful Act with him that did discharge the Fusée, cannot be guilty of Murder. *2dly*, We all agree, that if it were found that the Fusée had been discharged in Opposition to, or against any of the King's Officers, and thereby the said *I. S.* is killed, it would be Murder in them all; so that being not found, we cannot intend it: Therefore the Prisoner must be acquitted.

Parish of Godstone against that of East-Grinstead.

AN Order of two Justices for the Removal of a poor Person was quash'd at the Quarter-Sessions, and before the poor Person came back, the Parish, whose Order was quash'd, makes a new Order to fix him in another Place. And *per Cur'*, it cannot be good, because a new Order ought not to be made till the Party were come back; and if that Order had been confirm'd here, it would not make it good, because it was merely void.

Sessions quash an Order of Justices, and before poor Person comes back Justices make another Order, it is void.

Ward moved to bring so much Money into Court, to have it struck out of the Declaration. Now the Course is, upon bringing Money into Court to pay Costs so far, if the Plaintiff will take it out; but if it be such an Action in which the Defendant may plead Tender in Bar of Costs, and that the Plaintiff to oust him of that Benefit would reply a special *Capias test.* of a Term antecedent to the Principal; all this may be open'd and settled on Motion; *per Cur'*.

Money brought into Court.

Clifton versus Wells.

Action for these Words, *Thou art a pocky Whore, and carriest the Pox along with you.* And to maintain it these Cases were urged, 1 *Sid.* 224. 2 *Sid.* 5. 2 *Cro.* 430.

Words. *Thou art a Pocky Whore,* actionable.

1 *Ro. Ab.* 67. *per totam pag'* Dalton 150. Holt C. J.

7 Y.

No

No Difference between these Words, and those others, *He has got the Pox by a yellow hair'd Wench in Moor-Fields*; and sure to say that a Woman is a Pocky Whore, is that she is Pocky, *quatenus* she is a Whore; and to say that she carries the Pox along with her, makes it stronger; and Actions for Words are to be encouraged, for it is a great means to preserve the Peace, and any one will understand these Words to be meant of the *French Pox*. *Jud. pro Quer'*.

Jones versus Sweetapple.

Error cannot be assign'd of a Bond taken for Appearance, that it was not said to be *per nomen Vicecom'*, for might have pleaded the Statute.

ERROR of a Judgment in Debt upon a Bond in the Common Pleas, and the Error assign'd was, That it was a Bond for Appearance taken by the Plaintiff *colore officii*; and it was no where said that the Plaintiff was a Sheriff, but only that he took the Bond *per nomen Vicecom'*. *Holt*: Then you should have pleaded the Statute, and that Matter; and now you are too late; and Judgment was affirmed.

Dominus Rex versus Crosse.

A Fact made Felony by Statute, not indictable as a Misdemeanor.

AN Indictment was for a Misdemeanor for buying stolen goods, knowing them to be stolen: And after Verdict for the King, it was moved in Arrest of Judgment that the Offence was Felony by a late Statute made in the Time of the King and Queen, and therefore it was not punishable as a Misdemeanor. And *per Cur'*, before that Statute, buying of stolen Goods, knowing them to be stolen, was only Evidence of the Party's being accessory before; but by this Statute such Buying is made Felony. But *Note*; This Statute provides only to make such as are Accessories after guilty of Felony. And suppose one sets another to be robb'd, so that he is accessory before, yet he is not to be made a Felon till Conviction of the Principal; and if the Principal be admitted to his Clergy, he shall be discharged, that is, such Accessary shall. But *Note*; This is now remedied by an Act of Parliament of *this Queen's*: And Judgment was arrested.

Tipstiffs are Marshal's Officers.

Per Cur': It was agreed that the Tipstiffs are the Marshal's Officers, and he ought to have the putting of them in; and the Custody of the Tipstaff is the Custody of the Mar-

Marshal. And it is absolutely necessary to charge the Marshal in Debt for Escape, that he have Notice of the Party's being charged in Execution. Ante p. 583.

Debt upon an Award: The Defendant sets forth a void Award, and pleads Performance; the Plaintiff joins Issue upon the Performance; Verdict for Plaintiff; and moved this in Arrest of Judgment; and Judgment thereupon arrested. Verdict on a void Award, Judgment arrested.

Roswell versus Prior.

IN Case for the Continuance of a Nuisance by Lessee for Years against Defendant, who had been also a Lessee for Years of the Place where the Nuisance stood. Upon a special Verdict the Case was, the Defendant being possess'd for Years of a Piece of Ground adjoining to an ancient Messuage, with ancient Lights, whereof the Plaintiff was possess'd for Years, did erect a House thereupon, whereby the Plaintiff's said Lights were stopp'd, for which the Plaintiff brought a former Action, and recover'd Damages; after which the Defendant grants over the Ground with the Nuisance to another; and after the Plaintiff brings this Action against the Defendant for the Continuance of that Nuisance; and whether it lay was the Question, which was often argued. Salk. 460.
6 Mod. 116.
Tenant for Years erects a Nuisance, for which Damages are recovered, the Nuisance is continued in the Lands of his Lessee, Action for the Continuance of it may be against either.

1st. By *Northey* for the Plaintiff, and *Brotherick* for the Defendant. 2^{dly}, By *Darnel*, Serjeant for the Plaintiff, and Sir *B. Showers* for the Defendant. And lastly, by *Williams* for the Plaintiff, and *Wells* for the Defendant.

And for the Plaintiff it was urged, 1st, There can be no Remedy by Assize or *Quod permittat* against the Defendant or his Assignee, because they have but an Interest for Years, and the Plaintiff has a Wrong done him, and ought to have some Remedy, and that only can be by an Action upon his Case, and against whom shall he have it? Sure here it is material who erected the Nuisance, for that is the Original Tort, and Ground of the Action for *causa cause est causa causati*; and by the Erection he is become liable to the Plaintiff for all the consequential Damages happening to him by means of such tortious Erection; and his granting it over to another, is so far from excusing him, that it seems to aggravate against him, for thereby he seems to perpetuate the Wrong, for he puts it out of his own Power to abate it, and likewise raises himself a Profit from it by inhancing his Rent, and putting it by Contract into the Hands

3 Co. Wal-
ker's Case.

A *Quod per-*
mittat lies a-
gainst the E-
rector of a Nu-
fance without
Request, but
as against A-
lience Request
is necessary.

1 Vent 48.
1 Mod. 27.

Nufance con-
tinuing Nu-
fance, or all
at once dif-
ferent.

Hands of another, who cannot justify to abate it, without committing Waste. And the Erector by this Act of his would be answerable clearly for all consequential Damages, if he had not assign'd over; and it were most unreasonable that it should be in his Power to do wrong, and a continuing Wrong, and have it in his Power to choose Persons against whom the Party wronged shall have Remedy, and thereby clear himself. If one is Executor of his own Wrong, and after take out Administration, he shall not thereby so purge the Wrong, so as to deprive a Creditor of the Liberty of charging him as Executor of his own Wrong; *ergo a fortiori* here. In 5 Co. 101. a. *Pennuddock's Case*, a *Quod permittat* lies against the Erector of a Nufance without any Request made, but not against Alience without Request. 2 Cro. 373. in Point, that an Action lies against the Lessor for a Nufance continued by his Lessee, it being erected by him. *Vide* 3 Cro. 191. He that is hurt by a Nufance, tho' long after the doing the Act that occasions it, shall have his Action against him that does such Act. 2 Ro. Ab. 137. 2 Leo. 153. 3 Leo. 174. The Plaintiff's Remedy is of Necessity against the Defendant or his Assignee, it will not lie against the Assignee without Notice and Request, and that must be personal; and that will still be more absurd to favour a Wrong-doer, so far as to discharge himself of a Remedy against him for a Wrong, by putting a farther Difficulty upon him to whom he has done the Wrong: Besides, it is doubtful whether the Action would lie against the Under-Lessee, and if it does not, sure it will lie against the Lessor; for it will not be said, that by the Grant over the Plaintiff shall be depriv'd of all Remedy. *Vide* 3 Cro. 520. That the Action would not lie against the Assignee of Land whereon there is a Nufance. 1 Ro. Rep. 320. And as to that the Diversity was remembred, when the Continuance occasions a new Nufance, as in Case of a Pent-house, where every new dropping of the Rain is a new Nufance; and where the Nufance at first Dash has done all the Mischief it can; in the first Case Action will lie against the Assignee, but not in the other. 2 Cro. 373, 555. And the Case in 11 Co. 51. was strongly urg'd; Disseisor makes a Feoffment over, Disseisor re-enters, he shall recover Damages for the mean Profits against the Disseisor, tho' the Feoffee took them; and so is *Hob. 98.* and that was said to be a stronger Case than the principal Case now in Question.

Of the other Side it was said, that this Action either lay against Assignee alone, or at least it ought to be brought against him

and the Assignor jointly; for it being for the Continuance only, and that after Assignment over; and to make the Assignor answer Damages in such Case, were to charge him for a Nuisance in a Place which is not his: And as the Assignee has the sole Advantage of the Continuing, so he ought to be charged with the Disadvantages likewise; and for this were quoted 2 Cro. 555. F. N. B. 124. H. I.

Before W. 2. c. 24. Assize of Nuisance lay not against E-
rector of a Nuisance after Granting over the Freehold; and
the only Remedy was by *Quod permittat*, and that lay only
against the Alienee. 2 Inst. 405. And the Alienee alone
ought to answer for Damages in an Action on the Case, as
he should in a *Quod permittat*, or at least it ought to be
brought against them both; as if two Coparceners commit
a Nuisance, and one of them dies, the Assize or *Quod per-*
mittat must be brought against the surviving Aunt, and the
Heir of the other. 2 Inst. 406.

Before W. 2.
24. Assize of
Nuisance lay
not against E-
rector of Nu-
sance after As-
signment.

The Reason of a Remedy for a Nuisance, is because of the Maxim *Sic utere tuo, ut alteri non noceas*; and here the Thing which occasions the Wrong is not the Defendant's, all that the Defendant did was to erect, and for that Damages have already been recovered against him, and since he has done no Nuisance; for the Erection cannot be said a Continuance, no more than the Continuance to-day can be a Continuance to Morrow.

This were to punish one for what he cannot redress; for he cannot justify the Abating this Nuisance. And this Case was put by them; If a Man does falsely imprison another, and after the Imprisonment is continued at other People's Contrivance, the first Wrong-doer shall not answer for that in Damages, *cujus contrarium verum est*, if he were not discharged of the first Imprisonment.

He ought to answer Damages for the Continuance, who ought to abate it; and at Common Law the Alienee in Case of Freehold ought to abate, for the *Quod permittat* lies against him alone; *ergo* he alone ought to answer Damages upon an Action upon the Case; and the same Reason holds in Case of Lease for Years. The Continuance is the Wrong complained of, and the sole Foundation of the Action; and the only material Question is, by whom it is continued? and sure that must be the Occupier. And Damages ought to be recovered against him for whose Benefit it stands, and that is the Occupier. And as the Writ of a Demandant is altered by an Alienation, so may his Remedy for Damages. If one throw a Log over a private Way
7 Z which

which *A.* has over his Land, and after alien, will an Action lie against him for the Continuance of this Log a-thwart the Way in the Hand of the Alience? Or if a Man build a Cottage, without allotting so many Acres of Ground to it, and then grants it over, will Action lie for the Continuance of it?

Erecting and Continuance are several Offences, and every Day's Continuance of the Nufance is a new Nufance; for it is the Possession and *Usage* of this Nufance, to the Damage of another, is the Cause of the Action, and that is done by the Assignee. And if Defendant be answerable for this Nufance, by the same Reason his Heir would, if this were a Lease out of the Inheritance; for he might abate it as well as the Defendant, and he would be advantaged by it, by Increase of the Rent.

There is a Diversity between an Act, that is in it self a direct Wrong to another, and an Act in it self lawful, but consequentially injurious to another; the Case of Disseisin before put is of the first Sort, and therefore the Disseisor by making a Feoffment over, is not quit of answering the mean Profits; for otherwise the Disseisee would be without Remedy, for he has none against the Feoffee who is in by Title, and has done no Wrong to him. But the doing a Thing on one's own Soil, is primarily and directly no Wrong to another, but may be so consequentially by the Effects of it; and for this *vide* 1 *Rol. Rep.* 393. One set up Poles in his own Ground in order to build a House, which when erected would be a Nufance to another, he cannot abate them to prevent the Nufance; and if a Trespasser builds a Nufance upon my Soil, and I never use it, *quare* whether the other has any other Remedy than by abating it. And here the Plaintiff has his Remedy against the Assignee for the Continuance, so there is no Necessity to give him one against the Assignor; and the Necessity is the Reason of the Case of the Disseisin so much insisted on.

It is true, one shall not transfer his Wrong over to another, so as to discharge himself; and that is also a Reason of the Case of Disseisin before put. But here the Erecting the House is not in it self a tortious Act, but becomes so only *ab effectu*. And here is a Recovery against the Defendant already for the Tort arising from the Erecting, and thereby the Erecting is altogether become lawful; for the Recovery is a Recompence for the Wrong, and gives the Wrong-Doer a Right to that which before was wrongful. As if *A.* takes away the Horse of *B.* for which he recovers Damages

gages, the Property of the Horse is thereby vested in *A*. And if in this Case the Assignee had assigned over, would an Action lie against him for the Continuance after? If it would not, there is no Reason it should in this Case, for the original Tort is here purged by the Recovery.

Per Cur': A *Quod permittat* must be brought against the Alienee, because in its Nature it must be brought against him that is Tenant of the Freehold. An Assize of Nuisance must be against the Alienor and Alienee; but if the Alienee dies, the Party must have a Writ of Entry in the *Per*, and not an Assize. And sure this Action is well brought against the Erector, for before his Assignment over he was liable for all consequential Damages; and it shall not be in his Power to discharge himself by granting it over; and more especially here, where he grants over, reserving Rent, whereby he agrees with the Grantee that the Nuisance should continue, and has a Recompence, *viz.* the Rent for the same; for sure when one erects a Nuisance, and grants it over in that Manner, he is a Continuor with a Witness. And suppose in this Case, the Lessor or Assignor had been seised in Fee, and had erected this Nuisance, and then infeoffed another over, he had conveyed this as a Nuisance and *Causa causa est causa causati*. And if a Wrong-Doer conveys his Wrong over to another, whereby he puts it out of his Power to redress it, he ought to answer for it. And where it is objected, that the Tort of Erecting is purged by the Recovery for the Erecting, that is not so, for then the Erector might lawfully continue the Nuisance; but if the Nuisance continue after Recovery for the Erection, such Continuance will be such a Nuisance as a new Action will lie for: And the putting it out of one's Power to abate a Nuisance, is as great a Tort as not to abate it when it is in your Power to do it. And it is a fundamental Principal in Law and Reason, that he that does the first Wrong shall answer for all consequential Damages; and here the original Erection does influence the Continuance, and it remains a Continuance from the very Erection, and by the Erection, till it be abated. And the Case of the Disseisor and Disseisee is full in the Point; for what makes the Disseisor liable for Damages when the Lands were in the Hands of his Feoffee, but the original Tort. And in case of Disseisin, Trespass does not lie for the Profits till Re-entry; and by the Re-entry, tho it be upon the fourth or fifth Feoffee, the Disseisin is purged, and whoever continues in after is a new Trespasser; and for continuing in after such Entry, Damages shall be recovered against the Feoffee;

A *Quod permittat* can only be brought against the Alienee, as being Tenant of the Freehold.

Action may be brought against the Erector, he thereby being liable for all consequential Damages, which he cannot purge by Assignment over.

Action will lie for Continuance of a Nuisance.

Vide 2 Cro.

231.

He who does the first Wrong shall answer for all consequential Damages.

Feoffee; for the Disseisin by his Re-entry was purged, and the Title by which the Feoffee was in is defeated, and the Feoffee continuing in after is a Trespasser, or Disseisor, as the Disseisee pleases. And the Distinction, that the Building is not merely a Nuisance, is very metaphysical: It is true, if you abstract the Building from the Hurt that it occasions to the Neighbour, it is no Nuisance; but sure the Building a House, which is a Nuisance, is a *Malum in se*; for one must use his own so as not to hurt another; and these Lights being antient, the Plaintiff has as much Right to them as the Defendant has to the Land; and his User of the Land is restrained by the Interest the Plaintiff has in his Lights. *Note*; It was farther said by the Court, that if one takes another Prisoner by Wrong, and then turns him over to another Officer, who detains him, the first Taker shall answer for all the consequential Damages. But if this Action here were brought by an Alienee of the Land, to which the Nuisance was, against the Erector, and Erection had been before any Estate in the Alienee, the Question would be greater; because the Erector never did any Wrong to the Alienee. But here they agreed to give Judgment for the Plaintiff.

Q. 2 Cro.
373.
Whether it
be Waste in A-
lienee to a-
bate a Nu-
sance.

Tho' Action
lies against
either, shall
be but one
Satisfaction.

Note; Holt C. J. said in the Debate of this Case, that he was not satisfied with the Case of *Rippon and Bowls*, 2 Cro. 373. 1st, That it would be Waste in the Lessee to abate the Nuisance. 2^{dly}, In case it were, that therefore an Action would not lie against him for the Continuance of it; for it was the Lessee's Fault to contract for an Interest in Land on which there is a Nuisance. But the Action lying against the Lessee is no Reason why it should not lie against the Lessor, for the Party shall have but one Satisfaction; for, the Plaintiff having his Election against which of them to bring it, by commencing it against one has determined his Election; as if one may bring Trover against two jointly or severally, and he brings it against one, and has Damages once ascertained, he is for ever barred against the other; and so it is in Battery.

Finch versus Harris.

Ante p. 420,
433.
Tho' Dona-
tive be ex-
empt from the
Ordinary's Ju-
risdiction, the

Prohibition was moved for to stay a Suit in the Spiritual Court, against a Clerk in Orders, for Preaching without a Licence, upon Suggestion, that there is a Chapel Donative within such a Parish, four Miles distant from the Mother Church,

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Clerk of it is not, who may be punished by Ecclesiastick Censures, but not to Deprivation.

Church, and that it is consecrated; and that this Suit below is for Preaching there, so the Ordinary has nothing to do with it; and the Design of this Libel is to bring in Question whether this be a Donative or a Chapel of Ease. But *per Cur'*: None can preach without Licence of the Ordinary, whose Cure it is to prevent Heresies and Schisms in his Diocese; and there is a Canon against Preaching without Licence, and that binds all the Clergy. And a Clerk ordained cannot preach even in the Diocese whereof he is, and by whose Diocefan he is ordained, without Licence; tho' one would think the very Ordination would amount to a Licence to preach within that Diocese. And tho' it be true, that Ordinary cannot punish him by Deprivation of this Benefice, it being a Donative, yet he may censure him otherwise; for otherwise the Inconvenience would be intolerable; that it should be in the Power of a Man, by putting in a Clerk into such Donative, to exempt him from the Censures of the Ordinary and Subordination to the Ecclesiastical Law. And *per Holt*: It is against the Law Ecclesiastical to preach in a Place not consecrated; and it would be to set up a Conventicle. Indeed one may pray in his own House for Family, but he cannot preach there; and this Clerk, without Question, is visitable by the Ordinary, tho' he has no Jurisdiction over the Thing, so as to deprive, as in Case of a Rectory. And here they at last moved for a Prohibition *quoad* the Reading of Prayers; but it was denied.

Per Cur': One committed to Marshal by the Court, may be brought up by Rule of Court; but one committed by a Judge in his Chamber cannot be brought up without a *Habeas Corpus*, to which a Return may be made.

One committed by Judge in his Chambers must be brought up by *Habeas Corp.*

Strechpoint versus Savage.

DEBT upon the Statute of 5 *Eliz.* for using the Trade of making *Chartas pictas*, Anglice *playing Cards*, from the 23d of *February* till the 23d of *January* following, *ciz. Per duodecim menses integras*, not having served his Time for seven Years. After Verdict it was moved in Arrest of Judgment, that the Computation here is by Calendar Months, whereas by the Statute it must be by *Lunar* Months; and for this was quoted the Case of the *King v. Stowbridge*, *Mich. 6 W. 3.* And if this should be construed, that if he used it for the Time mentioned here, he must have used it

Computation of Time. Vide 1 Vent. 211.

for eleven *Lunar* Months of Necessity, then it will be uncertain when they will begin the Computation; and the Defendant may be again charged for Part of the Time for which this Recovery now is, and cannot plead this Recovery in Bar; and the right Way had been to say, that from such a Day *per undecim menses prox' sequent'* he used it. The second Exception was, that *Chartæ pictæ* were painted Cards, and not playing Cards, for the *Latin* for playing Cards is *Chartæ lusoriæ*. But *per Cur'*: The Romans had not playing Cards, and *Chartæ lusoriæ* may as well be a Kight as any Thing else; but the other would be fatal, but is help'd by the Verdict's finding him guilty of two Months *Lunar* next after the 23d of *February*. And if a Man use a Trade fourteen Days in one Month, and then ceases, and uses again fourteen Days in the next Month, he is not punishable by the Statute.

Colt versus Swift.

Appeal.
If the Indictment, on which the Conviction was, were vitious, or Plea ill pleaded, must plead to Issue.

Benefit of Clergy, and Burning in the Hand, is no Judgment.

IN an Appeal of Murder by *Colt* against *S.* for Death of his Brother, a Conviction of Manslaughter, and Clergy allowed, was pleaded in Bar, and allowed to be good; but it was also agreed, that if the Indictment, on which the Conviction was, were vitious, or if this Plea were ill pleaded, the Defendant must plead to Issue. And therefore it was excepted to the Indictment, that the Latitude of the Wound was not set forth, *Vide 4 Co. 40 & 42*. But *non allocatur*; For the Depth of the Wound and the Place where it was were ascertained; and the Reason why such Curiousness is requisite is, that it may appear to be the same in Identity, and that it was mortal; and both these Ends are answered by the Description of the Wound, as it is in the Indictment. Another Exception was, that the Indictment did set forth, that two other were present and abetting, but not said in what County they were. *Sed non allocat'*; For however that might be as to the Abettors, yet it could not be an Exception for him, who was charged as Principal, for it was laid where he was. And here, *per Holt*, the Benefit of the Clergy, and Burning in the Hand, is no Judgment. And if a Man be convicted of Manslaughter, and no Judgment of Death given, *Antersfoits convict'* will not be a good Bar of an Appeal, but Conviction and Benefit of Clergy is: And if one be convicted of Manslaughter upon an Appeal, the King may pardon the Burning in the Hand, which shews it is

no Judgment, for then could not the King pardon it: And the Statute of *H. 7.* has taken away the Judgment of delivering over to the Clergy, but orders a Mark to be put on the Party.

Crosse versus Smith.

J. C. 2. L. Raym. 836. Salk. 148.

Error of a Judgment in the Court of *Ely*, in an Action for Words; the Error assigned was, that after the Plaintiff levied, and before Issue tried, a *Certiorari* issued out of the *C. B.* to remove the Proceedings into that Court, which Writ was duly served upon the Judge, before the Jury sworn, and allowed by him; that notwithstanding he proceeded to try the Cause, and so gave Judgment, which was void, as being *coram non Judice*. To this the Defendant pleaded the Charters of Creation of the Franchise of Conusance of Pleas to the Predecessors of the Bishop of *Ely*, and an Allowance thereof in the Courts of *Westminster Hall*: And on Demurrer the Case was argued several Times at the Bar. And now *Holt C. J.* delivered the Judgment of the Court: Sure if the *Certiorari* be well penned, it is a *Superseas* of all Proceedings below; and the Counsel cannot be in Earnest, when they pretend to make the Franchise of *Ely* in equal Degree with that of a County Palatine. And admit the Charter had been to hold Plea of all Matters arising within that Precinct; can any Man think that by this all the King's Subjects should lose the Benefit of the King's Courts, which are Part of the Constitution of the Government, and Part of every Man's Birth-right to sue and be sued in. And it would be very inconvenient if it were so; for suppose a Man goes to Market within this Jurisdiction, there he is arrested, and if he has not Bail living within their Jurisdiction, he must go to Gaol; for Bail out of the Jurisdiction will not do, because their Process cannot reach such Bail; and besides, he shall have his Cause tried by Strangers to him, and Acquaintance of the Plaintiff's living within the Jurisdiction: And sure it never was in the Power of the Crown to deprive the Subjects of their Birth-right, as to make such a Grant binding upon them. 2dly, The Grant is, that the Bishop should have Conusance of Pleas; what is that? That one living within that Jurisdiction should implead another in the Bishop's Court, for a Cause of Action arising within that Jurisdiction; and who is to claim this, if the Action should be commenced above? not the Defendant, for he cannot plead it

Salk. 148.

Far. 138.

Certiorari to the Court of *Ely*.

Post. in this Term, Taylor v. Reynolds.

The Franchise of *Ely* and County Palatine not in equal Degree.

Bail out of the Jurisdiction not good.

Conusance of Pleas is, that one within the Jurisdiction may implead one within it for a Cause arising there.

for eleven *Lunar* Months of Necessity, then it will be uncertain when they will begin the Computation; and the Defendant may be again charged for Part of the Time for which this Recovery now is, and cannot plead this Recovery in Bar; and the right Way had been to say, that from such a Day *per undecim menses prox' sequent'* he used it. The second Exception was, that *Chartæ pictæ* were painted Cards, and not playing Cards, for the *Latin* for playing Cards is *Chartæ lusoriæ*. But *per Cur'*: The Romans had not playing Cards, and *Chartæ lusoriæ* may as well be a Kight as any Thing else; but the other would be fatal, but is help'd by the Verdict's finding him guilty of two Months *Lunar* next after the 23d of *February*. And if a Man use a Trade fourteen Days in one Month, and then ceases, and uses again fourteen Days in the next Month, he is not punishable by the Statute.

Colt versus Swift.

Appeal.
If the Indictment, on which the Conviction was, were vitious, or Plea ill pleaded, must plead to Issue.

Benefit of Clergy, and Burning in the Hand, is no Judgment.

IN an Appeal of Murder by *Colt* against *S.* for Death of his Brother, a Conviction of Manslaughter, and Clergy allowed, was pleaded in Bar, and allowed to be good; but it was also agreed, that if the Indictment, on which the Conviction was, were vitious, or if this Plea were ill pleaded, the Defendant must plead to Issue. And therefore it was excepted to the Indictment, that the Latitude of the Wound was not set forth, *Vide 4 Co. 40 & 42*. But *non allocatur*; For the Depth of the Wound and the Place where it was were ascertained; and the Reason why such Curiousness is requisite is, that it may appear to be the same in Identity, and that it was mortal; and both these Ends are answered by the Description of the Wound, as it is in the Indictment. Another Exception was, that the Indictment did set forth, that two other were present and abetting, but not said in what County they were. *Sed non allocatur*; For however that might be as to the Abettors, yet it could not be an Exception for him, who was charged as Principal, for it was laid where he was. And here, *per Holt*, the Benefit of the Clergy, and Burning in the Hand, is no Judgment. And if a Man be convicted of Manslaughter, and no Judgment of Death given, *Anterfoits conceit* will not be a good Bar of an Appeal, but Conviction and Benefit of Clergy is: And if one be convicted of Manslaughter upon an Appeal, the King may pardon the Burning in the Hand, which shews it is

no Judgment, for then could not the King pardon it: And the Statute of *H. 7.* has taken away the Judgment of delivering over to the Clergy, but orders a Mark to be put on the Party.

Crosse versus Smith.

J. C. 2. L. Raym. 836. Salk. 148.

Error of a Judgment in the Court of *Ely*, in an Action for Words; the Error assigned was, that after the Plaintiff levied, and before Issue tried, a *Certiorari* issued out of the *C. B.* to remove the Proceedings into that Court, which Writ was duly served upon the Judge, before the Jury sworn, and allowed by him; that notwithstanding he proceeded to try the Cause, and so gave Judgment, which was void, as being *coram non Judice*. To this the Defendant pleaded the Charters of Creation of the Franchise of Conusance of Pleas to the Predecessors of the Bishop of *Ely*, and an Allowance thereof in the Courts of *Westminster Hall*: And on Demurrer the Case was argued several Times at the Bar. And now *Holt C. J.* delivered the Judgment of the Court: Sure if the *Certiorari* be well penned, it is a *Superfedeas* of all Proceedings below; and the Counsel cannot be in Earnest, when they pretend to make the Franchise of *Ely* in equal Degree with that of a County Palatine. And admit the Charter had been to hold Plea of all Matters arising within that Precinct; can any Man think that by this all the King's Subjects should lose the Benefit of the King's Courts, which are Part of the Constitution of the Government, and Part of every Man's Birth-right to sue and be sued in. And it would be very inconvenient if it were so; for suppose a Man goes to Market within this Jurisdiction, there he is arrested, and if he has not Bail living within their Jurisdiction, he must go to Gaol; for Bail out of the Jurisdiction will not do, because their Process cannot reach such Bail; and besides, he shall have his Cause tried by Strangers to him, and Acquaintance of the Plaintiff's living within the Jurisdiction: And sure it never was in the Power of the Crown to deprive the Subjects of their Birth-right, as to make such a Grant binding upon them. *2dly*, The Grant is, that the Bishop should have Conusance of Pleas; what is that? That one living within that Jurisdiction should implead another in the Bishop's Court, for a Cause of Action arising within that Jurisdiction; and who is to claim this, if the Action should be commenced above? not the Defendant, for he cannot plead it

Salk. 148.

Far. 138.

Certiorari to the Court of *Ely*.

Post. in this Term, Taylor v. Reignolds,

The Franchise of *Ely* and County Palatine not in equal Degree.

Bail out of the Jurisdiction not good.

Conusance of Pleas is, that one within the Jurisdiction may implead one within it for a Cause arising there.

1 Vent. 156.

Which must
be demanded
by the Lord
of the Franchise.

Where, if Justice be not
done, a Re-
summons shall
go.

27 H. 8. c. 24.

Exempt Jurisdiction is, that
shall not be
impleaded out
of Jurisdiction,
which he may
insist on, or
wave.

it to the Jurisdiction of the Superior Court; but the Course is for the Lord of the Franchise, by himself, his Bailiff or Attorney, to come into the Superior Court, and produce his Charter of Conusance; or if it be very antient, to shew an Allowance of it in that Court, and pray Conusance. And upon Allowance of his Claim, the Court above appoints him a Day to hold this Court on, and directs the Parties to go down on that Day; and if Justice be not done below, the Record remaineth here above; and the Court has a constant Superintendancy over the Cause. So that if Justice be not done below, as if the Defendant live without the Franchise, and has nothing within the Franchise by which he may be summoned, or that the Judge does not do Right, the Plaintiff may come up and shew this Matter to the Court, and thereupon a Re-summons shall go upon the Record here, and the Court shall proceed to do Justice here; so that tho' Conusance be allowed according to the Grant, yet the Matter shall be brought back hither, if Right be not done below; and all this was for the Benefit of the Lord of the Franchise; and even this was hard enough upon the Subject. And there was great Reason for this Course in former Days, when great Men did abet and maintain Parties, and these great Franchises generally obtained by Abbots and Churchmen, who then had three Parts of the Lands of the Kingdom in their Possession; and they received Legitimacy more from Length of Time than from any Reason that there was for them. And so is the Statute of H. 8. concerning Resumption of Liberties, that all these Jurisdctions are detrimental to the King and his Prerogative; and for that Reason their Power of Pardoning in County Palatines, and making of Justices, is taken away. And there have been always *Certiorari's* to correct Abuses in these Jurisdctions.

Exempt Jurisdiction is this, and was granted to Cities or Towns Corporate for Benefit of Trade; it was a Grant to the Freemen of such a City or Town, that they should not be impleaded out of their City or Town, and this Grant was good, if there were a Court in the City or Town to hold Plea of the Matter. And if such Inhabitant, in that Case, be impleaded in any other Court, he shall plead this Franchise to the Jurisdiction; and if he were sued below, he might have a *Certiorari* and remove it up; for the Privilege of being sued no where else, being for his Advantage, he may wave it: So there is no Court can stand against a *Certiorari*. In *London* they have a Way of proceeding by foreign Attachment; yet it is every Day's Practice to remove

the Cause up hither by *Certiorari*, and thereby all the Proceedings below upon the Attachment are dissolved.

A third Sort of Franchise is *tenere placita*, that is, Power to hold Plea of Matters within such a Precinct, but does not exclude any other Jurisdiction, nor intitle the Lord to claim Conusance. 9 H. 6. 59. Cases are removable out of inferior base Courts, by *Recordare* or *Pone*, as the Case shall require; but to remove out of a Court of Record, it must be by *Certiorari*. And to say such a Writ is not found in the Register; *ergo* it does not lie, is no Argument, for Half the Writs used in *Westminster-Hall* are not in the Register.

Franchise to hold Plea of Matter within such a Precinct, does not exclude any other Jurisdiction.

Cases are removed out of base Courts by *Recordare* or *Pone*, but out of Courts of Record by *Certiorari*.

The Statute of 43 *El.* means *Certiorari's* by the Words (other Writs) and it is remarkable, that the Thing complain'd of there is, not that the Writs were used, when in Truth they did not lie, but that an Abuse was made of them, *viz.* that they were brought after Trial; and therefore it provides that no *Certiorari* or *Hab. Corp.* shall be brought or allow'd, unless it be deliver'd before the Jury sworn. And again, The Statute of 21 *Jas. c. 23.* takes Notice of *Certiorari*, and only complains of the oppressive Manner of using them, *viz.* after Party had proceeded a considerable Way below, and likewise removing Causes of small Value; and therefore the Courts below are allow'd to detain Causes under five Pounds; and likewise where the *Certiorari* or *Hab. Corp.* is not deliver'd before Issue join'd, so that it be not join'd within six Weeks after, &c. both which Statutes shew this Writ was lawful, but abused, and the Abuses are only cured; and if the Writ were not legal, the Parliament would have condemned it, as well as the Abuse of it.

And the King's Courts are for his Subjects and People, as well as for himself; and as when it is granted to a Corporation to hold a Session of the Peace within their Burrough, before such and such Justices, that are Freemen of the Town, tho' such a Grant is a Franchise to them, and it is as much their Right to hold Sessions and take Conusance of Matters proper for their Jurisdiction, as it is the Bishop of *Ely's* Right in this Case; yet by daily Practice *Certiorari's* go to them to remove Indictments from before them to this Court; so by the same Reason it will lie here; and it is more just and honourable for the Subject to receive Justice in the King's immediate Courts, and from Judges appointed by himself, than from Judges named by his Fellow Subject; and there is as much Difference between the King's

It is better to
bring *Habeas*
Corpus than
Certiorari.

If by the
Course below
Special Bail be
required, Spe-
cial Bail must
be above, else
Procedendo
shall go.

Courts and those that are held by Franchises, as there is between the People he governs by himself, and those he governs by his Vice-Roys in his Plantations. And he quoted a Case in 2 *Ro. Ab.* 493. *Jonson v. Ellis*; An Action was brought in the Court of *Maidstone*, and an *Hab. Corp.* brought and served in due Time, and notwithstanding Judgment given below; and this Judgment was for this Error reversed. So here if the *Certiorari* be good in the Form and Frame of it, that is, if it describes the Record right, without doubt the Judgment is erroneous. And *Holt* said he wonder'd the People did not bring a *Hab. Corp.* and not a *Certiorari*; for the Defendant may well say, I will not be sued in this Inferior Court, but will be sued above, and there I will put you in such Bail as the Court above will reach, tho' your Process cannot come at them, and that I cannot give you such Bail as you can reach; and so he may well remove the Cause by *Hab. Corp.* And in such Case, if he do not put in such Bail above as the Action would require below, a *Procedendo* should be granted; for if by the Course below there ought to be Special Bail, tho' Common Bail would do if it had commenced above originally; yet Special Bail must be given above, or a *Procedendo* shall go. And if one Action require Special Bail, and another not, and that do not appear to be done fraudulently to hold to Special Bail, there we will hold it to Special Bail, or grant a *Procedendo*; but if Fraud appear we will retain it. And tho' the principal Case be between two Persons dwelling within the *Isle of Ely*, yet that makes no Difference. And he said he had known Inferior Courts held to harder Play than this, for he had known in the Common Pleas, that in Escape out of Execution upon a Judgment in an Inferior Court, the Officer was let in to alledge that the original Cause of Action was not within their Jurisdiction, tho' it were laid to have been within it, admitted by the Party so to be: But I think that hard, because it is a Court having Jurisdiction; and since they have shewed the Matter within that Jurisdiction, and that has been admitted on Record. I hold the Party himself would be after concluded to say that it was not within, and by Consequence the Officer is so too. And it has been held that False Imprisonment would lie against an Officer for the Arrest, if the Cause had not arisen within their Jurisdiction, tho' it had been alledged by the Plaintiff to have arisen within it, and so confess'd by the Defendant; but that was hard. But the best Way is to

make

make right Use of their Jurisdiction, and not to pretend to hinder the Subject of his Right of using the King's Courts: And Property is much larger now than formerly; for then there were many Villains, but now we are all Freemen. *So per Cur'*, It is apparent Error, but then an Exception was taken to the Writ of *Certiorari*.

Thomson versus Southwell.

DEclaration was generally of *Easter Term*; and the Cause of Action laid in such a Day in *April*, which Day in Fact was within the Term. And 1st, It was agreed the Court would judicially take Notice of the first Day of that Term, *viz.* what Day of the Month it was, and consequently that the Cause of Action accrued after it. 2^{dly}, That a Declaration generally of such a Term, without any special *Memorandum*, refers to first Day of Term; otherwise, if there were a special *Memorandum* of the Time of filing the Bill, or of giving Bail; so if it be made out in Fact to have been at a Day after the Day of Cause of Action mention'd, it may be set right. But upon Examination, it appear'd the Declaration was accepted by Consent, (which *Holt* said was a filing of Common Bail of Course) but there was no Writ or Process returnable; and thereupon *Holt* declared, if there were a Process returnable at a Day certain, and it had appear'd when Bail had been put in, that would be a Ground for Amendment; but it being only found that Common Bail was filed, that must refer to first Day of Term; and Judgment was arrested. *Vide 2 Lev. 12, 13, 176. 3 Keb. 112, 124, 693. 1 Vent. 135. Hob. 70.*

Term.
Court will take
Notice what
Day of the
Month Term
begins.

Declaration of
such a Term
refers to the
first Day, if
there be no
Special Me-
morandum.

Dominus Rex versus Cranmer.

AN Indictment was for Perjury; the Defendant enter'd into a Recognizance to try it, and was desirous to carry it down to try, but the Prosecutor entred a *Non Prof.* *Per Cur'*: It was an ancient but illegal Practice, that if an Indictment had lay still for a long Time, to enter a *Non Prof.* upon it. But that ought not to be without Leave of the Attorney General, not even at the Request of the Prosecutor; for it would be of intolerable Mischief, that it should be at the Discretion of Prosecutor to make an End of the King's Suit, and also to get a Bill for an infamous be-

Non Prof.
entred by Pro-
secutor, set
aside.

Crime found of Record against one, and by such Entry of *Non Prof.* deprive him of the Means of clearing himself by Trial. And for these Reasons the Court did set it aside; and if the Indictment be vitious, an Acquittal in it will be no Bar to a new one.

Venue not
changed in
Covenant.

Venue is never changed in Covenant.

Riot may be
by asserting a
Right with
Force.

Per Cur': If one goes to assert his Right with Force and Violence, he may be guilty of a Riot. *A.* has Right of Common in such a Close, which belongs to *B.* who, after the Corn taken away, sows Pease in it; he cannot by such a Trick deprive *A.* of the Benefit of his Common.

Courtney versus Hornigold.

Ante p. 533.
On claiming
Oyer of A-
ward, if it
contains more
Matter than
Plaintiff set
out, he cannot
recover.

DEBT upon a Bond for Performance of an Award; *Nul Award* pleaded; Replication sets forth an Award of such and such Things of one Side, and such Things to be perform'd of the other Side, all well awarded, assigns Breach, and brings the Award into Court; Defendant prays Oyer thereof, and has it; whereby it appeared that it did contain more Matter than the Plaintiff did shew in his Replication, and demurs for the Variance. And it was urged, that if Issue had been taken upon the Replication, and the Award, whereof Oyer was given, had been produced in Evidence, the Plaintiff must have been nonsuited, for they were quite different Awards. And the Award is intire, and ought to be altogether set out, for there may be that in the Award, which if set out might make it all void, or at least shew that the Plaintiff had no Cause of Action; for suppose here they had concluded by declaring that they had made no Award, or had awarded that the Plaintiff should deliver to the Defendant twenty Pounds and a Horse, and that thereupon the Defendant should deliver a certain Deed to the Plaintiff; can it be said, if the Plaintiff had brought Debt upon a Bond for the Performance of that Award, and upon *Nul Award* pleaded should reply, and set forth an Award that the Plaintiff was to deliver the Defendant a Horse, whereupon the Defendant should give him up the Deed, that upon Issue thereupon the Award made would maintain the Issue? Besides, the Submission is with an *Ita quod de premissis*, and the Award set out in Replication is not so. It

was agreed, that perhaps in Debt upon the Award this Way would do; but this being a collateral Thing, *viz.* a Bond with a Penalty, it will not do.

To which it was answer'd, That true it is, if the Defendant had come to excuse himself of the Forfeiture of his Bond, he ought to set out the whole Award; but when one is only to shew Cause of Action, it will suffice to shew enough that a Cause of Action may appear to the Court; *vide Woodman and Mantle's Case in Ploed. and Hammond and — Case in Brownl.* If a Man be bound to *B.* to pay him such a Sum, provided he makes a Feoffment upon Condition to *C.* in an Action brought upon this Bond, the Defendant shall not crave Oyer of the Deed of Feoffment, and alledge that it is not according to the Condition of the Bond.

Holt, C. J. The Award must be reciprocal, or else it is not good; and you have omitted Part of what is to be done of one Side, and therefore a Part of the Award to be done of your Side, which was traversable by the Defendant; and if it would be against you on Verdict, it will be so too on Demurrer upon Oyer. And tho' your Declaration upon the Bond, and the Breach alledg'd be well, yet if that which you shew upon Oyer does not maintain it, you are gone, where it is necessary to set out a collateral Matter to make the Declaration good. And he advised them to discontinue, and pay Costs, and so they did.

Stamford versus Sims.

IN Replevin, the Defendant avow'd the Taking *in quodam* Avowry. *messuagio vocat'* the *D.* in such a Parish. Note; The Replevin was for Goods taken *in quodam messuagio vocat' B.* and the Avowry, that *prædictum messuag', in quo* the Taking was, was called *D. absque hoc*, that the Taking was in *B.* and upon Demurrer *Jud. pro Quer' per Cur'*, for the Way had been to say that the *locus, in quo* the Taking was, was call'd *D. absque hoc*, that it was in the said Messuage *vocat' B.* and *pro returno habendo* to make Title to the Distress. *Vide 2 Lev. 92. 1 Vent 127. ant. 67.*

Smith versus Oxbring.

Bail shall have eight Days in full Term, after Return of Process against the Principal, to render.

DE B T upon a Recognizance Bail. *Holt*: This is much practised of late to oust the Bail of the Benefit of rendering the Principal, as he may do on a *Sci. Fa.* and since there is Reason the Bail should have equal Indulgence in both Cases, let the Rule be that the Bail have eight Days in full Term after Return of Process against the Principal to render him. So if for the Purpose Process be return'd only within four Days of the End of the Term, the Bail shall have four Days in the next Term to render, and upon their bringing in the Principal in the mean Time they shall be discharged; and till that Time be past, the Court will grant an Imparlance.

Jackson versus Bridge.

Covenant by Executor against a Person on a Covenant to serve Testator or his Assigns, averring that he used the same Trade.

DEfendant did covenant to serve the Plaintiff's Testator and his Assigns for eight Years; and the Question was, whether the Plaintiff as Executor was an Assignee in Law, for by the Agreement it is not fix'd to the Person of the Testator; for if it were, the Executor should have it, and it would be Assets in his Hands, *vide Plowd. 287. b. 288. a.* And it was said, that if the Executor did set up such a Trade as the Servant was to be employ'd in by the Covenant, it ought not to determine by Death of Covenantee. *Secus* it were hard to transfer the Servant to another Service, and so it was said it would be in Case of an Apprentice; and here it being aver'd that the Plaintiff used the same Trade in which the Defendant had covenanted to serve, he had Judgment.

Gibbs versus Walkley.

Double Error in Fact assign'd is ill.

But if there be Error apparent in the Record, shall be reversed.

A Double Error in Fact was assign'd. And *per Holt*, the Way is to plead *in nullo est erratum*, and shew the Duplicity for Cause to affirm the Judgment, *vide 1 Ro. Ab. 763.* But if apparent Error appear on the Record, notwithstanding the ill assigning of the Error in Fact by Reason of the Duplicity; yet Judgment ought to be reversed for such

such apparent Error; but here no such Error appearing on the Record, the Judgment was affirm'd, because of the Duplicity of the Error in Fact. *Per Cur'.*

Lane versus Green.

DEclaration, That the Defendant the eighth of *September* 1689, *per scriptum suum obligatorium concessit se teneri, &c.* to the Plaintiff; and upon Oyer the Bond bore Date the eighth of *September* 1699, and for the Variance a Demurrer. And it was urged, that since the Plaintiff varied the Lien from the Date of the Bond, he ought to shew when it was first deliver'd; and the right way had been to declare upon the Bond with the Date it bore, and then to say *primo deliberat'* at such a Time, and at this Rate one might declare upon a Bond after the Action brought. But *per Cur'*, Since it is said that such a Day *concessit se teneri*, it is well, for that could not be without it were then deliver'd; it is well enough. *Jud. pro Quer'.*

Date of a Bond
is when it is
deliver'd.

Gree versus Rolle.

Ejectment against two, who enter into the common Rule of confessing Lease, Entry and Ouster; at the Trial before a Judge of *Nisi prius*, one of them refuses to confess Lease, Entry and Ouster; and the Plaintiff enters a *Retraxit* against him, which the Judge of *Nisi prius* records, and goes on to Trial against the other, and Verdict for the Plaintiff. And it was moved in Arrest of Judgment, 1st, That a Judge of *Nisi prius* cannot record a *Retraxit*, for before the Statute of *York* 12 Ed. 2. he could not record a Non-suit, and a Non-suit against one would make an End against both; and yet a *Retraxit*, as here contended for, would not make an End as to both, but would sever the Pleas of the Parties against their own Consent; it is true, if they had sever'd in pleading, a *Retraxit* against one would not discharge the Suit against them both, for there the one Defendant is not concern'd with the other. 1 *Sid.* 76. Covenant against two to build a House artificially, and one of them lets Judgment go against him by Default; the other pleads that he did build the House artificially, and a Verdict for him; and held he that suffer'd Judgment by Default should be discharged too, for now it appears there was not such Cause of

Salk. 456.
In Ejectment
a *Retraxit*
was enter'd as
to one at *Nisi*
prius, and
Trial against
the others, and
held well.

Before 12 Ed.
2. c. 4. Judge
of *Nisi prius*
could not re-
cord a Non-
suit.

of Action against both, as the Plaintiff declared on. 1 *Sid.* 376. Action against two Executors, one of them confesses a small Quantity of Assets, and Plaintiff replies Assets *ultra*; *vide* the Book at large, which *Holt* denied to be Law, and quoted *Long quinto Ed.* 4. 108. *Bro. Judg.* 77. And it was further urged, that the Entry of a *Retraxit* did not discharge the Defendant, against whom it was entered, from being Party to the Issue, till there is Judgment given *quod eat inde fine die*; and that cannot be done by a Judge of *Nisi prius*, but must be done above after the Return of the *Postea*, and the Estoppel begins from that Judgment; and a *Retraxit* must be enter'd in Court, and *in propria persona*, and cannot be by Attorney according to the Rule of *Beecher's Case*.

2dly, It was said, that after a *Retraxit* against one, the Judge could not try the Cause against the other, for his Commission was to try an Action against two; the Parties themselves might have sever'd in Pleading, but the Judge of *Nisi prius* has only Power to try the Action. This is not like a Protection, which the Judge of Assize may receive and record, and yet may proceed and try the Cause; for if the Protection lies not, or lies, and is not well cast, the Trial shall stand; but if it lies and is well cast, the Trial shall go for nothing; but after a *Retraxit* well entered against one, the Judge of Assize has no more Power to try the Cause than he has upon a Plea *Puis darrein continuance*; and there all he can do is to record the Plea, and bring it up, and then the other Party may reply, take Issue, or demur, and the Matter shall be determined above; *quod Holt concessit*. And if the Judge of *Nisi prius* cannot discharge the Defendant, he still remains Party to the Issue before him; and the Judge's Commission being only to try that Issue to which he is Party and Privy, he can try no other; and he said, a Judge of *Nisi prius* could not plead an Excommunication in the Pl. *Puis darrein continuance*, tho' that be a legal Disability, and the Defendant had no other Opportunity of pleading it; and that is much a stronger Case than the present, and more deserving of the Equity of the Statute of *York*, 12 *Ed.* 2. c. 4. and 18 *Ed.* 3. 38. and 2 *Rol. Ab.* 630. are express, that a Judge of *Nisi prius* cannot take a Plea of Excommunication; but he may do whatever is necessarily incident to the Trial, as to take a Challenge to the Array or Juror, Witness, &c. and it is by subsequent Acts of Parliament that they have Power to give Judgments in some particular Cases, as Felony, Treason, *Quare impedit*, &c.

vide Hard. 112. Style 104. and the Statute of 14 H. 6. W. 2. c. 3. for, as Judges of Nisi prius, they can do nothing but what tends to the Trial of the Issue, and without a Judgment one cannot be severed from the Issue, and then it cannot be tried against one without the other.

To which it was said, that a Judge of *Nisi prius* may do whatever tends to the Aid or Furtherance of the Business.

2 *Inst.* 425. 17 *Ed.* 3. 22. He may receive a Protection. Plea *Puis darrein continuance* is recorded every Day by them: They may likewise receive a Challenge, and record a Demurrer to it. *Telv.* 181. And why may he not as well receive and enter a *Retraxit*, which is no more than an Agreement on Record, that he will not prosecute against that Party; and a *Retraxit* is not a Confession of the Want of Cause of Action, but an Agreement not to proceed. And therefore if Trespas be brought against two, one may enter a *Retraxit* against one, and proceed against the other, for by the *Retraxit* the Writ does not abate; and yet if he had confessed, that he had no Cause of Action against one of them, the Writ would have abated, and he could not proceed against the other; for such Confession falsifies his Writ, which a *Retraxit* does not; and in Ejectment against two, and a joint Plea, and *Venire*, and before Day of *Nisi prius* one of them dies, the Plaintiff may suggest the Death of one of them at the Trial, and upon Entry thereof proceed against the other; and a Defendant may at a Day of *Nisi prius* *relieta verificatione cognovit actionem*, and that may be entered by a Judge of *Nisi prius*; and why may not he as well enter a *Retraxit*; for all the Parties are demandable at the Day of *Nisi prius*, and an Entry of their Appearance is always on the *Postea*, and the Plaintiff is demandable before the Jury give their Verdict; and sure the Judge may as well record a *Retraxit*, whereby the Plaintiff agrees to cease his Prosecution for ever, as a *Cognovit actionem* of the Defendant's Side, or a Nonsuit of the Plaintiffs. *Vide Co. Ent.* 172. as to recording of *Relieta verificatione cognovit actionem*. And it was also said, and indeed not denied, that if there be two Defendants in Trespas, and they plead Not guilty, and at the Trial one of them *relieta verificatione cognovit actionem*, that the Judge must record it, and proceed against the other; which was said by Gould Justice to be the same in Effect with this Case.

Judge of *Nisi prius* records Plea *Puis darrein continuance*.

A *Retraxit* is only an Agreement not to proceed, and not a Confession of having no Cause of Action.

If Ejectment be against two, one dies, Suggestion may be of it, and proceed against the other.

Cognovit actionem may be entered at *Nisi prius*.

And then as to his Power of trying the Issue against the other, was quoted 2 *Roll. Ab.* 630. *pl.* 13. Two Coparceners in a real Action, and one of them is nonsuited at the Af-

Non prof. does
not amount to
a Release.

size, the Judge of Assize may record the Nonfuit, and try against the other; and if the Defendant had severed in Plea, the Plaintiff might be nonsuited against one, and proceed against the other; and so is the Case in 1 Cro. 243. And so he may enter a *Retraxit* against one, and proceed against the other; for a *Non prof.* does not amount to a Release. *Ibidem.* And it was said, that this was only an Action of Trespass, which was in its Nature several; and therefore tho' the Defendant did jointly plead Not guilty, yet that Plea would be taken, as the Nature of the Action, distributively; as much as if each Defendant had pleaded Not guilty, in which Case, a *Retraxit* might well be against one, and Proceeding against the other. *Vide* 11 H. 7. 6. 1 Cro. 243. is against *Hob.* 180. that *Non prof.* before Judgment is no Release, and is Law, *vide* 3 Keb. 136. acc' to Cro. a.

Where several
join in a Plea
there is but
one *Venire*;
if sever, there
must be several
Venire's.

Holt C. J. agreed the Case in 1 Cro. 243. to be Law; but said there was great Difference between a several Plea and a joint one; for where many join in a Plea, there goes but one *Venire fac'*, but if they sever, there shall be several *Venire fac'*; or if there be but one, it must be special, and it must be mentioned to be for the Trial of several Issues. And it is true, in Trespass against many, and Not guilty pleaded by all, it is so far a several Issue, that the Jury may find some guilty, and acquit the rest, tho' all join in the Plea, for the Words are, *Veniunt & dicunt quod non sunt inde culpabiles*. If a Judge of *Nisi prius* allow or disallow a Challenge, it is all *sub modo*; for if he allows it, when it ought not to be, or *vice versa*, and that appears on the *Postea*, the Trial shall go for nothing; but as to Things of Necessity, he is to allow them; as of Pleas *Puis darrein continuance*, as Release between Day of *Nisi prius* and Day in Bank; because the Defendant has no other Time to plead it than at *Nisi prius*, for that the Day of *Nisi prius* and Day in Bank, as to Pleading, are the same; and in such Case, all he has to do, is to receive the Plea, and return it upon the *Postea*, for the Judges of Courts above to judge of. And after the Statute of *Nisi prius*, and till the Statute of *York*, a Judge of *Nisi prius* could not record a Nonfuit; and therefore during all that Time none could be nonsuited at *Nisi prius*; and if that Statute does not enable him to record a *Retraxit*, how can he do it; and sure this Entry of a *Retraxit* is not a Matter of Necessity; for in this Case now before us, the Jury might acquit him that would not confess Lease, Entry and Ouster, and give a Verdict against the other, and that had been the true Way. And Besides,

Day of *Nisi prius* and Day in Bank, as to Pleading, are the same.

the Party might have entered his *Retraxit* above, and therefore likewise it was no Matter of Necessity to have it done at *Nisi prius*; and he said this was a Maggot that could not crawl. And he said, that he was not satisfied with the Case before put, that one could not plead Excommunication in the Pl. *Puis darrein continuance*, at *Nisi prius*. And he agreed, that a *Retraxit* was not a Confession of Want of Cause of Action, but only an Agreement on Record to cease Proceedings against that Defendant; and yet in that Case, if he may proceed against the other Defendant, as he may in some Cases, he shall recover his Possession and Damages against him; and if, by Virtue thereof, he would molest the Possession of him, against whom the *Retraxit* is enter'd, he shall therefore maintain Trespass against him; and besides, if it be done by Fraud, the Court upon Motion will set it aside. And whereas the Cause in 2 *Vent.* 195. was quoted, where in Ejectment against two, one of them would not confess Lease, Entry and Ouster, or does not appear, the Plaintiff was nonsuited against both, and had Costs taxed against him; and it is said, that he that would not appear had an Interest in the Costs, and might release them. *Holt* said, if there be two Defendants in Ejectment, and they enter into the common Rule, and at the Trial they will not confess Lease, Entry and Ouster, the Plaintiff shall be nonsuited, but shall have Judgment against the casual Ejector; but if one of them only does refuse to confess it, he shall be acquitted, and the Plaintiff, if he shew Title, shall recover the whole against the other. And if Judgment be against the casual Ejector, and it be made appear that no Declaration was rightly served, the Court will set it aside. And if at Common Law an Ejectment had been against one that had nothing in the Land, and upon Judgment against him another is turned out of Possession, there was no Remedy for the right Owner but Trespass, or a Writ of Deceit; and this still is all the Certainty any Man has of his Possession; and now all we can do is to set such Recovery aside, and to punish the Offender. And he confessed the Case of the Defendant's *Relicta verificatione cognovit actionem*, that by the Judge of *Nisi prius* it may be recorded; but he said, that was because there it would be in Vain to try the Issue; but it was never attempted, that where there were two Defendants and *Non prof.* entered against one of them, that the Plaintiff could proceed against the other, but where they sever'd in Pleas. And he remember'd *Hob.* 70, 180. 1 *Cro. Walsh v. Bishop*; and the same in 1 *Bulstrode*, and a Case in

in the Year 1650. Ejectment against two, one confessed the Action, and the other pleaded Not guilty, and it was questioned, whether the Plaintiff might enter a *Non prof.* against one of them, and have Judgment against the other; and then it was held he could not; and a Difference was taken between Trespass and Ejectment, but he said he did not take that to be Law; or that the Writ should abate by a *Non prof.* against one; or that there was any Difference between Trespass and Ejectment, in that Point. *Vide Rast. Ent.* 66, 72. Affize against two, the one is found guilty, and the other acquitted, and Judgment and Damages against him that was acquitted, and for the other; and the Precedent in 3 Co. 50. Sir George Brown's Case is in Point, so in Case of Ejectment, and why may not it be so in this Case? He agreed, in Ejectment they could not be nonsuited against one, and proceed against the other; but if there be two Defendants, and one of them will not appear, or will not confess Lease, Entry and Ouster, he may be acquitted, and the Plaintiff proceed against the other; and he who is acquitted is a Party to the Record, and if he cannot have a Writ of Error, it is because he is not hurt by the Judgment; and if there could be a Verdict against him, he should have a Writ of Error; and if there had been an actual Ouster, as formerly, he should have a Writ of Error. If one confess Lease, Entry and Ouster for as much of the Premises as are in his Possession, the Jury shall inquire against him alone for so much; and if the other will not appear, or not confess, &c. there shall be Judgment for so much of the Premises as are in his Possession, Judgment against the casual Ejector. And where one will not confess Lease, Entry and Ouster, he shall be acquitted; and that will be as well for the Plaintiff, for as to him he may have the Judge's Certificate for Judgment against the casual Ejector. If one be nonsuit for the Defendant's not confessing Lease, Entry and Ouster, upon Certificate thereof there must be Judgment against the casual Ejector; and may not his Certificate of an Acquittal for the same Cause have the like Effect? And if there be several Defendants, and some confess for all in their Possession, and there be others will not do it, let them that will not, be acquitted for that Reason, and the Trial go on as to the rest, and Judgment be for so much upon the Verdict, and for the rest against the casual Ejector; and that will fetch the Possession equally well for the Plaintiff. And he said in my Lord North's Time, if there were several Defendants, and one of them would not confess Lease, Entry and Ouster,

In Ejectment cannot be nonsuited against one, and proceed against the other.

If one Defendant will not appear, or confess Lease, &c. he may be acquitted, and Plaintiff proceed against the other.

As to him who will not appear, Judgment shall be against the casual Ejector for so much on the Judge's Certificate.

Ouster, the Plaintiff was nonsuited against all, and had Judgment for the whole against the casual Ejector; and that he said was hard, to turn one out of Possession for the Default of another, who was willing to defend his Title. And he said he never knew a *Non prof.* against one when two had join'd in a Plea enter'd at *Nisi prius*, but it might be done above, and a *Distringas* taken out as to the other only. At last it was held well by *Gould* and *Powis* against *Holt*; and Error was brought before the Lords, and Judgment affirm'd.

Craddoc versus Glin.

Action against an Attorney for Money received to Plaintiff's Use; the Attorney shewed to the Court that he had been employ'd as an Attorney for the Plaintiff, and had applied some of his Money towards Paying for his Labour, and some to a Solicitor in the Cause; and moved to have his Bill taxed, and an Allowance of what should then appear due to him. *Cur'*: If the Plaintiff had applied by Motion to have us to compel an Attorney, by Virtue of our Power over him as our Officer, to pay the Money, there, for as much as that is discretionary in us, we would not help the Plaintiff unless he did the fair Thing of his Side; but here when he demands no Favour of us, we cannot deny him the Law, and let the Defendant take his legal Remedy against the Plaintiff.

On Suit brought against an Attorney for Money received to the Plaintiff's Use, he moved to have his own Bill taxed, and an Allowance of what was due. Court will not interpose.

Johnson versus Allen.

PER *Cur'*: If two Tenants in Common be, and one of them does actually oust the other, he may maintain an Ejectment against him, and he shall not be admitted a Defendant without confessing Lease, Entry and Ouster; and in that Case the Plaintiff shall only recover his Purparty *pro indiviso*, and shall be put in Possession of no more; and in such Case the Sheriff shall give the same Execution as he would do of Rent upon Assize, and there can be no mean Profits at all recovered in Case of Tenants in Common. But if one enters only upon another, claiming only as Tenant in Common, and the other brings an Ejectment, it will be hard to enforce the Defendant, who has done nothing but as Tenant in Common, to confess Lease, Entry and Ouster; and here it

One Tenant in Common may maintain Ejectment against the other for an actual Ouster.

In such Case no mean Profits to be recovered.

To obstruct
making the
utmost Profit
of his Moiety
is an Ouster.

was ruled, that there should be a Confession of Lease, Entry and Ouster, in case it should appear to be an actual Ouster upon Evidence at the Trial; *secus* not. And it was agreed, that to obstruct one to make the utmost Profit of his Moiety, would amount to an Ouster, but not to consent to have the Rents raised upon the Tenants would not.

Vaspor and Edwards.

Salk. 248.
If Distress e-
scapes, the
Person di-
straining can-
not bring
Trespas, un-
less shews the
Escape was
without his
Default.

1 Inst. 89.
2 Cro. 245.

If Distress die
in Pound O-
vert for want
of Food, may
distrain *de*
novo.

Trespas *quare clausum fregit*, and fed his Grass with a Pig: Defendant as to all, except the Trespas by the Pig, pleads not guilty; and as to that, that the Plaintiff ought not to have his Action, for that he had taken the Pig doing the Damage, and impounded it in a common Pound at 7. and there the said Pig *ex causa præd. detinuit*; the Plaintiff confesses the Taking and Impounding, but that after the Pig without his Consent and Will did escape out of the Pound; and upon this a Demurrer; this Case depended a long Time, and was several Times spoke to at the Bar. And to maintain the Replication, it was said, that a Distress is but a Pledge, and if one be defeated of his Pledge, and has no Remedy over, he shall have Recourse to his original Remedy for the Thing for which the Pledge was taken; *vide* 2 Leo. 174. that a Distress is but a Pledge. If one bail Goods as a Pledge for Money, and the Bailee be robb'd of them, he shall maintain an Action for the Money. And here is no Default in the Plaintiff, for he could do no more than to impound it; and he could not justify the tying of it, so as to secure it from escaping; *vide* 27 Ass. pl. 64. And the whole Default is in the Defendant; 1st, In doing Wrong to the Plaintiff; and again, by not tendering Amends, whereupon he might have his Hog again; *vide* 2 Inst. 341. And if the Plaintiff is defeated of his Distress, through the Fault of the Defendant, he may distrain *de novo*; as if Distress die in Pound overt for Want of Food, the Distrainer may distrain *de novo*; *vide* Dy. 280. b. Hob. 61. 15 Ed. 4. 10. Ergo he may also bring Trespas if he please. And if Debt be brought for Rent issuing out of Land in the same County, levied *per* Distress without more will not be a good Plea; but he must also make a special Conclusion *Et sic riens arriere*, so that the taking the Distress and detaining thereof is not the material Matter, but the Rent's not being behind; and where no such Conclusion is, the Lands are in another County, and then it would not be

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material to make such special Conclusion, because the Rents being behind cannot be tried by Men of the County where the Action is brought. 22 H. 6. 13. pl. 9. 36 H. 6. pl. 1. 35 H. 6. 10. Rast. Ent. 175. Co. Ent. 49.

To this it was said, That in this Case the Plaintiff had his Choice to distrain, or bring Trespass; and when he has made his Election, and taken a Distress, he shall never have Recourse to any other Remedy till that Remedy proves ineffectual through the Act of God, or Wrong of the Defendant, neither of which has happen'd here; and therefore the Case of the Distress's dying in the Pound for Want of Food, that is in a Pound overt, or dying in any Pound by any other Chance, without Default of the Distrainer, is not like this: If the Defendant had brought a Replevin here, the Sheriff must have return'd an *Elongatur*, and could not return the Escape; vide 5 H. 7. — but he may return that they escaped, and came back to the Owner; vide Br. tit. Return 75. And here it does not appear that the Pig came back to the Defendant again, which shews the Plaintiff is not discharged of it, nor we chargeable for the Trespass for which he is supposed to have a Distress; and for which, if a Replevin were brought, and an *Elongat'* had been return'd, as it ought to be, a *Withernam* would go against the Plaintiff of his own Cattle. And if this had been a Case of Rent, levied *per* Distress would be a good Plea; for the Meaning of that Plea is not that the Money is actually paid, for then *Nihil debet* or *Riens arriere* had been the proper Plea, but the Meaning of it is, that the Party has taken a Distress, and still has it as a Gage for his Rent: And it was said the Escape here was through the Default of the Distrainer, for he might have put the Distress in a safe Pound; which if it were broke, he had a Remedy by a *Parco fracto*; or if this be the common Pound, and not capable of holding the Distress, it was his Folly to make use of it, when he might put it into any other safe Place, and make that his Pound; or perhaps he may have Remedy against the Lord for not maintaining a sufficient Pound; so that still he is at no Prejudice, or at least it is such a one as comes through his own Default, and then he may thank himself for it; for it was also denied that the Distrainer could not tie the Distress, but it was agreed it will be at his Peril, if through such Tying the Distress comes to any Hurt, for then he must answer for it; and the Case of 27 Ass. warrants no more; for the Distress must be in a convenient Pound, and if it be not such, and a Distress is put into it and abused, tho' it be

Person may distrain or bring Trespass, but when he has made Election, shall have no other Remedy, unless that be ineffectual by the Act of God, or the Party.

what

A common Pound is the Pound of the Distrainer, and to answer for all the Mischief Cattle suffer by its being a bad one.

If Cattle die for want of Food in a Pound Overt, the Loss is the Owner's.

Vide 1 Inst. 161. a.

Beasts taken in *Withernam* may be work'd, because are given in Lieu of the other's.

what is call'd a Common Pound, the Distrainer shall answer for it. And therefore if a live Beast be put into a Place in which there are sharp Spikes, by which the Beast is stuck, tho' it be a publick Pound, the Distrainer shall answer for it, for it is his Pound, and it is he shall have a *Parco fracto* for the Breach of it, and not the Lord; *vide Doct. & Stud. c. 27.* And it was said there were but two Sorts of Pounds, *viz.* Overt and Covert; Overt where the Owner may come and feed them without being a Trespasser, and Covert where he cannot have such Access. If the Cattle die in a Pound Overt for Want of Fodder, or without any Default in either Party, the Loss is the Owner's, which shews, that if they die through any Default of the Distrainer, as for Want of Food in a Pound Covert, it is at his Peril; so of other Defaults, as may be reasonably collected from the said Book of *Doct. & Stud. ubi supra.* And it was said that a Pound was not like a common Gaol, or a Hayward like a Gaoler, but only a common Servant to all that used the Pound. To all which *Holt, C. J.* strongly inclin'd. And he added this Diversity between Rent and Damage-fesant, for one may distrain any Cattle he finds on the Premises for Rent, but in the other they must be actually doing Damage, and are only distrainable for the Damage they are then doing, and continuing; for if they have done Damage to Day and gone off, and come again at another Time and are doing Damage, and are taken for that, and the Owner tends Amends for that Damage, the Party cannot justify Keeping them for the first Damage: And he said farther, That if ten Head of Cattle are doing Damage, one cannot take one of them and keep it till he be satisfied for the whole Damage, but may bring Trespass for the rest. And he said, That if Distress be stole or set at large by a Stranger, he shall not be answerable for it; but even in that Case if Replevin be brought, and an *Elongatur* return'd, as it must be, there shall be a *Withernam*, and the Distrainer liable till he shew that Matter, which being no Default of his will excuse him; and the Plaintiff in Replevin may work Beasts taken in *Withernam*, because they are deliver'd to him in Lieu of his own; and when the Matter is determin'd, if it go for the Plaintiff in Replevin he shall have Judgment for the Beasts in *Withernam*, if his own be not to be had; but if it be for the Defendant, he shall have his Beasts again, and may keep the Distress till he be satisfied. And when one distrains Damage-fesant, he has an adequate Satisfaction for his Damage till he lose it without Default

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in himself, for when he has Return irreplevisable, he can have no other Satisfaction but to keep the Distress till he be satisfied. And Damage-fesant is the strictest Distress that is, for the Thing distrained must be taken in the very Act; for if they are once off, tho' on fresh Pursuit, you cannot distrain them. If Tender be made of Damages before the Taking, the Taking is unlawful, if after the Taking, and before Impounding, then the Detainer after is unlawful; but Tender comes too late after the Impounding to make either the Taking or Detaining unlawful; but still after the Impounding the Distrainer may take the Amends, and let go the Distress, if he please. And if a Beast has done more Damage than he is worth, let him not distrain, but rather take his Action. And before the Statute of 23 H. 8. c. 15. no Damages were given in Avowry for Damage-fesant, but only a Return irreplevisable of the Thing distrained.

Distress for
Damage-fe-
sant must be in
the very Act.

And now this Term, after great Consideration, the Court deliver'd their Opinions *seriatim*. Gould, puisne Judge: The Plea in Bar is bad, and the Replication good. If the Distress had died in Pound, tho' after Judgment Irreplevisable, he might distrain a-new, or bring his Action; for it is, as *Hob.* says, the Effect of the Agreement of the Parties, or Act in Law, *Hob. 61. 15 Ed. 4. 10. Doct. & Stud. c. 27.* for the Party has the Goods as a Pledge, and as long as that continues he shall not have any other Remedy; but once it ceases to be a Pledge, his Action is restored to him, and it is in his Election whether he will retake his Distress or bring his Action of Trespass: If the Owner break the Pound, and let Distress go, the Distrainer shall have a *Parco fracto*, or may retake the Distress. 1 *Inst. 45. 34 H. 6. 18.* If one distrain, and as he is driving to Pound they escape, I may pursue and retake them, or bring Trespass, and the Reason is the same here. If Distress escape out of Pound, the Party may retake him, 27 *Aff. pl. 64.* but he cannot tie, for that would be a Misuser, and would amount to a Conversion. If the Distrainer suffer the Distress to escape by his own Consent, he discharges the Trespass; or if the Defendant had alledged any Default in him, that perhaps would alter the Case; so that he concluded the Replication was good. And the Plea is bad, it is that *nomine districtionis* he took and impounded, but that is not enough, for he should have said farther, that he still does detain the Distress. If a *Sci. Fa.* be brought upon a Judgment, and the Defendant pleads that he has been taken in Execution, that will not be enough, without saying farther, that he still continues in

Execution. *Raft. Ent.* 175. Where a Distress for Rent is so pleaded, and shewed to continue, so here as long as it is shewed that the Plaintiff has a Gage or Pledge, so long it is a Bar, but the Minute that Gage ceases against the Party's Will, the Action revives. And in all Cases where one pleads a Plea, which to be good must be continued, there he must shew the Continuance; as 12 *H.* 8. 2. 13 *H.* 8. 15. as if a Man makes Title under Tenant for Life, he must aver his Life. *Yelv.* 223. And he held the Return in Replevin in this Case might be made of the special Matter, as well as if the Distress had died in Pound, or escaped and came back to the Owner, which may well be done. *Vide Br. Return of Writs* 125. *Dalt. Ret. brev.* 104.

If Cattle taken Damage-fesant escape out of Pound, without Default of Distrainer, he has Remedy.

Powis, Justice: It would be of dangerous Consequence, if Cattle taken Damage-fesant should escape out of Pound without Default of him who did distrain, and that he thereby should become remedylefs; for a Distress, whether for Rent or Damage, is but a Gage. 2 *Cro.* 148. and they could not be sold at Common Law even in the Case of Rent, nor now for Damage-fesant; and the Distrainer cannot use them tho' it be for their Good, and therefore he cannot tan green Hides to preserve them, *Cro. El.* 783. nor Milch-Cows to preserve their Milk, or save them from Hurt, 1 *Ro. Ab.* 673. tho' it be allow'd, 2 *Cro.* 148. that Kine may be milked to prevent their being spoil'd: But I take *Ro.* to be Law; then if it be a Gage, it is a Gage for Satisfaction; and if that be never made, why shall the Party have no Remedy if there be no Default in him? for it is as true a Rule, that one shall be satisfied once, as that he shall not be satisfied twice. If Cattle distrained be put in Pound Overt, the Owner at his Peril must feed them; and if they die, the Distrainer shall bring his Action or Distrain again, *Dy.* 280. 1 *Inst.* 47. *Doct. & Stud.* 102. and the Reason of that is, because he lost his Pledge without Fault in him: Another Reason why he ought not to lose his Remedy is, because he cannot otherwise secure them than by Impounding, for he cannot tie them; *vide* 27 *Aff. ubi sup.* So if they be stolen out of the Pound Overt he is not liable nor remedylefs; but if he should put Things into the Pound Overt which are not proper to be put there, and they be stole, he shall answer for them; but if they be proper for Pound Overt, the Owner must keep them from Thieves, as from Starving. 1 *Inst.* 47. b.

If Cattle distrained be put in Pound Overt and die, Action may be brought, or fresh Distress.

So if stole out of it.

If Distress be stole out of Pound, and *Elongat'* be returned, the Distrainer to prevent a *Withernam* may shew that they

they were stolen, 32 H. 6. 27. b. Br. Ret. brev. 135. Nat. B. 74. and some Books say the Sheriff may return it. If the Cattle die in Pound, he may distrain in Case of Rent, or bring Debt; *ergo* if they die in Case of Damage-fesant he may bring Trespass. 15 Ed. 4. 10. Dy. 280. Hob. 61. Doct. & Stud. c. 27. f. 112.

But notwithstanding all this, the Action will not lie here, for Want of this material Word in the Replication, that the Distress escaped without Default of him; for it is not enough his Gage should be lost without his Consent, but it must be without his Default too, to intitle him to an Action. And he held the Plea good, tho' the Words *adhuc detinet* were wanting, for it is a Plea in Bar, and good to a common Intent.

Turton, J. The Plea is good; Plaintiff had his Election of two Remedies, Trespass or Distress, and using of one is an utter Waver of the other. 2 Co. Sir Rowland Hayward's Case. 9 Co. 51. and Hob. 59. an Election of one is an implied Rejection of the other. And Distress sufficient to satisfy the Rent is a good Plea in Bar to Debt for the Rent; so by Parity of Reason in Trespass. And he concurr'd with Powis, that the Replication was bad for the Cause above; and here was Defect in the Plaintiff to put the Distress into such a Pound, when he might put it into a safer, as every body must know he might have done; for a common Pound of a Manor cannot be look'd upon safe for a Pig; so he concluded against the Plaintiff.

Holt, C. J. I always was of the Opinion that now I am of, that Judgment ought to be for the Defendant; for it is plain there was a Time when the Plaintiff could not have maintained this Action, *viz.* when the Distress was taken, then the Defendant has pleaded this Matter, which did take away the Action; and so a Matter is pleaded which shews the Plaintiff had not an Original Cause of Action; and if the Plaintiff will admit the Truth of that Matter, he ought to shew some special subsequent Matter whereby he is now become intitled to that Action, whereof he was originally ousted by the Plaintiff's Plea, or remove the Matter that is made a Bar to him. And here the taking the Hog Damage-fesant is *prima facie* a Bar of the Action; and it is agreed, that if Distress is taken Damage-fesant, as long as it is detained it is a good Bar in Trespass.

As long as a Distress is detained, it is a Bar in Trespass.

But it is objected, That it is not shewn that the Hog is detained still; but sure a Bar is good to a common Intent, and it is enough for him that is distrained to shew a Distress taken

Bar is good to a common Intent.

Distress is not obliged to be in a common Pound, but in Pound Overt.

If Pound Overt be broke, *Parco Fracto* lies, tho' in another's Soil.

taken, and it behoves the other Side to shew how the Possession of it happen'd to be lost, and since he has lost Possession he knows best how; if he had shewn that the Defendant had taken it out of Pound, it might be somewhat, or even that it escaped out of Pound and run home to the Defendant, and that he came upon fresh Pursuit to take it, and had been hindred by the Defendant. And sure it is the Default of the Defendant that he put it in an ill Pound; sure none will say, that if a Hog be put into such a Pound as cannot keep it, and then it escapes, that he can after bring Trespass; and it being a common Pound makes not to the Case; for be the Pound common or not, it is the Pound of him that uses it for that Time; and the Law does not require a Man to put the Distress in a common Pound, but only that it be put in a Pound Overt, or be fed at Peril of the Distrainer, and taken care of by him; and common Pounds are either by Custom, Tenure, or Agreement among the Inhabitants of a Vill or Manor, and not by Common Law. But if there be a common Pound, and one will use it, he must take care to keep it; and if it be broke he shall have a *Parco fracto*, tho' it be another Man's Pound, as in another Man's Close, which shews it to be the Pound of him that uses it as such: Then he ought to keep his Pound, or if it be out of Repair, and he put Cattle in it, and they escape, is it reasonable he should take Advantage of his Neglect? sure it is not; for the Distress is for his Benefit, and the Law appoints none else to take care of it; and tho' some Pounds have Haywards, who are Officers in Leets, yet the Law takes not any Notice of them.

And to say that he does not shew in the Bar that the Plaintiff does detain it yet, it may be he does not detain it; for suppose it be replevied, the Plaintiff's Way would be to avow, and pray Return for the Damage; and if pending the Matter upon the Replevin this Action were brought, would you have it set forth in pleading this Matter, that he still detains the Hog? that would be false in Fact; so the Plea, *prima facie*, is good till it be avoided; as levied *per distresse, et sic nihil debet*; and tho' the Precedent in *Rastall* be *et adhuc detinet*, yet that is no Matter triable, but the taking the Distress is what is triable: And so it was there, for if a Man distrain for Rent or Damage-fesant, upon Replevin he must justify the Taking, and not the Detainer; and then, if upon the Avowry it appear that he had good Cause, he shall have Return; if the Distress be eloined or imbezil'd, there shall go a *Withernam* upon that Matter

returned on the *Returno habendo*; so if there might be a Replevin, whereby the Plaintiff would be dispossess'd of the Distress till Return; that would discharge the Action: And when it is pleaded that he distrain'd the Cattle, it shall be intended that he has them still, or that there is a Replevin pending; or if it be otherwise, it ought to come of the other Side; for if the Distress be taken from him by Replevin, as it well might be, that will not revive the Action of Trespas: If it escaped through his own Defect or Neglect, that will not revive the Action. And here he once had the Distress in his Possession, and is best able to give an Account of what is become of it; and if he does not shew that he has lost it by some Means whereby the Action is revived, it shall be intended to continue discharged. And here it does not appear how the Escape was, but only that it was without the Consent and Will of the Plaintiff; and all that might be; and yet be through his Neglect; and if so, the Action not revived. And suppose the Door of the Pound had not been lock'd, whose Fault is it? is it not the Fault of the Plaintiff, who ought to have shut it? So the Defendant has shewn a Distress, which is *prima facie* a Discharge of an Action of Trespas; then the Plaintiff ought to shew how it came to be revived. If Cattle die in Pound, it is true the Action is revived; why? because it is the Act of God; sure then there is a great Difference between the Death of the Distress in the Pound, without the Default of the Distrainer, and an Escape of them, which must happen through his Default, and be taken so till he shew the Contrary. And the Difference between an Escape of a Distress out of Pound, through Neglect or other Default of the Distrainer, and without his Default, is so material, that in one Case the Action of Trespas, &c. shall be revived, and in the other not. And I always heard a Bar was good to common Intent, because it is to excuse from a Charge; but a Replication must have a general Certainty, because it is to destroy the Excuse of the Defendant, which is always received favourably. *Et sic Jud. pro Def.*

If Escape out of Pound, without Distrainer's Fault, Action of Trespas revives, else not.

Dominus Rex versus Villam de Andover.

THEIR Charter is, That the Mayor and major Part of the Corporation may turn out whom they please. Charter of Andover. And *per Cur'* after Argument, There is no Remedy for it, their Constitution being so.

Attorney, who
gives another
Leave to prac-
tise in his
Name, is an-
swerable for what is so done.

Per Holt: If one Attorney gives Leave to another to practise in his Name, he shall answer for all the Villanies and Practices as he shall act in his Name.

Mandamus
will not lie to
swear in a
Steward of a
Copyhold
Court.

Mulso moved for a *Mandamus* to swear in a Steward of a Copyhold Court. *Holt*: The true Reason of *Mandamus* was when Aldermen, Capital Burgeses, or such other Officers concerning the Administration of Justice, were kept out, to swear them into, or at least restore them into their Places; and we ought not to grant it to swear a Registrar for a Bishop, tho' it be an Office of a publick Nature; and he said he would not care to do it for the Steward of a Leet, tho' heretofore it were used to swear a Physician of the College; and it is rare to grant it where one has any other Remedy; and here it is a private Officer to do Service for the Lord. And it was not granted.

Taylor versus Reignolds.

Ante p. 643.
Salk. 148.
Conusance of
Pleas no good
Return to a
Hab' Corpus.

TO a *Habeas Corpus* to the Stannary Courts it was return'd, that they have Conusance of Pleas by the Charters of *Ed. 1.* and another of *Ed. 3.* and that this Matter might be well return'd were quoted *Style 255. 1 Rol. Ab. 547, 548.* *Holt*: Conusance of Pleas, or exempt Jurisdiction, were never returned to a *Habeas Corpus*; for then they might return a Falsity to support their Jurisdiction, which would not be traversable, and so a Subject would be ousted of the Privilege of suing, or being sued, in the King's Superior Court, without an Opportunity of controverting the Matter; and he quoted the Case of *Bishop v. Percival* in *Hard.* And as to an exempt Jurisdiction, that always is for the Benefit and Ease of the Resiants within such a Vill, Borough, &c. not to be sued out of their Vill, &c. and then sure they may waive that Benefit, and remove their Causes to the Superior Courts. And if one, who is within an exempt Jurisdiction, be impleaded out of it, his Way is to plead it, and the Lord has nothing to do with it; but as to Conusance of Pleas, that cannot be pleaded by a Defendant, but must be demanded by the Lord of the Franchise, his Bailiff or Attorney.

If one who is
within an ex-
empt Jurisdic-
tion be sued
out of it, he
must plead it.

Conusance of
Pleas cannot

be pleaded, but must be demanded by the Lord.

Vincent versus Preston.

PER Cur': When once a Thing is made a *Concilium*, Where a Thing is made a *Concilium*, Judgment cannot be enter'd without Leave of the Court. one cannot enter Judgment, or make any other Alteration, without Leave of the Court; and the Case of *Crosgate* and *Green* was quoted, which was, two Breaches were assigned in Covenant, and an Answer only to one of them, and for that a Demurrer; but before it was put in the Paper, Judgment was by *Nihil dicit* entered upon that, which was not answered, and well; and all the Difference between that and this is, that here it is made a *Concilium*; and yet Judgment by *Nil dicit* entered without Leave of the Court. And it being again moved by the Attorney General, who seem'd to satisfy the Court, that the Judgment might be well enter'd for that Part of the Declaration which was not answered in the same Term, tho' it was pretended to be a Discontinuance: Yet because they had entered it up without coming to the Secondary, which is irregular, it being a Judgment for Want of Plea, the Judgment was set aside.

Taylor's Case.

THE Question in a Motion made by *Meade* was, whether a Service of a Declaration in Ejectment on *Sunday* were good now upon the Statute of 29 Car. 2. And *per Cur'*, It is not; for it is a Process, tho' not a judicial one; for it is compulsive on the Party to appear; and it may as well be said, that Service of a Summons in a real Action may be good on *Sunday*. Declaration cannot be delivered on a *Sunday*. Ante p. 606.

Parishes of Halstead and Melford.

AN Order to remove a Wife and Children to the Place of the Husband's last legal Settlement; and held bad as to the Children, for they might have a legal Settlement, different from the Husband, but it might stand as to the Wife. But another Exception was, that there was no Adjudication that any of them were likely to become chargeable to the Parish from whence they were removed; and tho' it was said, that they came to settle there contrary to Law; yet for the last Exception the Order was quash'd *in toto*.

Dominus

Dominus Rex versus Paroch' de Minton.

Order confirmed on Appeal is final to that Parish; so if it be not appealed from.

PER Cur': If one Parish make an Order for the Removal of a Poor to another Parish, and that Order is confirmed upon an Appeal, that Parish is for ever concluded against all other Parishes; so is an Order made, and not appealed from, final. But the Exception was taken, that the Appeal, on which an Affirmation is final, ought to be to the General Quarter-Sessions, and here it was said to be at the Quarter-Sessions, without more. But for as much as it did appear to be at the Sessions held on such a Day, which was the very Day appointed by the Statute for the Holding of the General Quarter-Sessions, the Court would intend it the General Quarter-Sessions; *multum renitente Holt*: For since the Act gave the Appeal to a particular Jurisdiction, they that would go upon that Statute ought to pursue it precisely, and expressly shew it, without leaving any Room for Intendment.

Dominus Rex versus Bishop.

Outlawry of Murder on Confession of Attorney General that had no Lands. Ante p. 544, 545, 626.

HE came to reverse an Outlawry of Murder, and upon Confession of the Attorney General that he had no Lands or Tenements, which Confession recited, that it so appeared to him on *Affidavits*; the Outlawry was reversed for the common Error, that the Court was not said to have been held *pro Com'*. So it was reversed without any *Sci' fac'* to the Lords immediate and mediate; and he was sent Prisoner to the *Old Bailey*.

If one Defendant in Trespas dies, *Puis darrein continuance*, and at Trial his Default be recorded, his Death may be suggested, and Judgment had against the other.

Per Holt: In Trespas against two, and after Issue joined, and *Puis darrein continuance*, one of them dies; the Plaintiff may at the Trial get his Default recorded, and proceed to Trial, and have a Verdict against the other; and he may before Judgment come and suggest the Death of the Defendant who died, and have Judgment against the other. And taking the Inquest against one, where there are two Defendants, and one of them dies, *Puis darrein continuance* cannot be Error, if the Default of the other be recorded, and his Death be suggested before Judgment; and one cannot plead Death of a Party in Abatement, *Puis darrein continuance*.

Post Clausu' hujus Terminii apud
Guild-hall coram Holt, Ward &
Hatsell.

Civitas London versus Wood.

I have in a thin folio Mss. a case between some parties in respect to some subject, but upon a habeas corpus out of the case, & subsequently to the case.
IN an Action brought in the Mayor's Court against Wood Ante p. 269. Debt on a By-Law in the Mayor's Court for refusing to serve as Sheriff for 400*l.* as a Forfeiture; for that he being duly chosen Sheriff did not serve, or otherwise discharge himself by fining, &c. according to the Act of Common Council 7 C. 1. It appeared the Plaint was levied in the Court of the Mayor and Aldermen on the 15th of November, and that the Defendant gave Bail for his Appearance the next Day, viz. the sixteenth, and instead of continuing from the fifteenth to the sixteenth, Day is given from the said fifteenth to a certain Day in June; and then the Entry is, that the Cause was removed by Habeas Corpus to the Common Pleas, and sent down by Procedendo. And then the Defendant pleaded Nil debet, & hoc parat' est verificare, ut liber homo of the City, and offers to bring six Freemen of the City to be his Compurgators; and a Demurrer to this Plea; and Judgment against the Defendant; of which this Error is now brought before the said Judges Commissioners. And Hatsell, one of the Barons of the Exchequer, who argued first, divided the Case into four Points. 1st, Whether Wager of Law held in the Case. 2. Whether there were a Discontinuance. 3. In case there were a Discontinuance, whether it was now amendable by the Record in the Mayor's Court, supposing that to be right. 4. Whether this Action be brought in a proper Court, scil' that of Mayor and Aldermen, it being for a Forfeiture to the City.

And per luy: Wager of Law lies not here; for that never lies but in respect of the Weakness and Inconsiderableness of the Plaintiff's Ground or Cause of Demand; and when the Ground of his Demand is so small and weak, that the Defendant's Oath, and that of Compurgators, may be look'd upon as of equal Consideration with it, then a Wager of Law may well be; but never where the Foundation of the Demand is of greater Regard than the Defendant's Oath, then it never lies. 1 Inst. 292. It lies not where there lies a Specialty or Deed to charge the Defendant;

but only where the Cause of Action is only a bare parol Transaction, which as it may create a Duty, yet it is such a Duty as may be discharged in the same Manner that it is contracted; and the Reason of it is grounded upon the Presumption of Law, that one for no worldly Consideration will forswear himself; and it is an Argument that the Matter is of no great Value, that the Plaintiff did not take Care to have better Security for it than the slippery Memory of Man, and the Incertainty of a verbal Contract: So that since the Lien or Tie was so light, it is no Wonder if the Law will lightly discharge it. Another Reason of a Wager of Law is laid down in 2 *Inst.* 45. *b.* That the Defendant might have Witnesses of his Discharge, who might be dead, as none can keep his Witnesses alive; and since nothing appears to charge him but a parol Agreement, which might have been discharged with the like Solemnity, which the Defendant might have proved if his Witnesses were not dead; for that Reason too, the Law thought convenient to admit of a Discharge by Wager of Law. Nor is there any Hardship in all this, because the Plaintiff might have prevented it by providing a Specialty; but he held the first Reason to be the only true Reason, *viz.* the Feebleness and Exility of the Ground of the Plaintiff's Demand; and it suffices, that the Nature of the Defendant's Discharge be of equal Validity with the Ground of the Plaintiff's Charge. And Wager of Law is allowable in five Cases. 1. In Debt upon simple Contract, which is the common Case. 2. In Debt upon an Award upon a parol Submission. 3. In an Account against a Receiver for Receipts by his own Hands. 4. In Detinue, tho' the Bailment were by the Hands of another. 5. In an Amerciament in a Court-Baron, or other Inferior Courts not of Record. And in every of these Instances the Action is grounded upon a feeble Foundation, and of small Consideration in Law.

Vide 2 Saund.
65.
Sid. 160.
1 Keb. 599.
Vide Rol. Ab.
140.
8 Co. Beecher's Case.
Mo. 276.

The Case of an Amerciament in Court-Baron is nearest to the present Case of any, tho' nothing like it, for such Amerciaments are generally for private Matters, as inclosing or over-charging of Commons, or other private Transgressions; but this Offence, for which the Penalty is laid here, is of a publick Nature, and concerns the Administration of Justice in the Service of Sheriffs of *London* and *Middlesex*. And tho' this Penalty be inflicted by an Act of the Court of Common Council, which is no Court of Record; yet it is a Court so vastly different from Courts-Baron, or such other petit Courts, that in 4 *Inst.* 245. my Lord *Coke* does not stick to

compare

compare it to the Court of Parliament, where the Mayor and Aldermen represent the Upper House, and the Commonalty the House of Commons. And what immediately concerns the good Government of *London*, does very nearly concern the whole Kingdom; of which *vide* 8 Co. 187.

The King, as Fountain of Justice, has the Nomination of Sheriffs all over the Kingdom; and since he, by his Patent, has delegated that Power for *London* and *Middlesex* to the City of *London*, as incident thereto, they must not only chuse Sheriffs, but may also compel them to serve; for otherwise here would be a Failer of Justice, and the Consequence of that in these two Counties would be of extream Danger to the whole Kingdom. The Office is of very great Concern, for he has the Custody of the County; besides, it concerns the Publick Revenue, Part whereof he collects; and it is given for a Reason in *Slade's Case* in 4 Co. that a Wager of Law lies not in *Quo minus*, because the King's Revenue is remotely concerned, upon Suggestion, that the Plaintiff is indebted to the King, and less able to pay him by the Defendant's Detainer of his Debt; *ergo a pari* in an Action concerning the Acceptance of an Office relating to the King's Revenue, he ought not to be received to his Wager of Law. Besides here is a Contempt in the Defendant, which he ought not to be allowed to swear off. Also all the Matters that charge him are Facts notoriously known, in which there never are any Precedents of Wagers of Law. Again, when the Matter of the Charge is pregnant with Matter of Law, there ought to be no Wager of Law, for that were to swear to the Law; as in Debt against Husband for Cloaths taken up by the Wife, the Husband shall not wage his Law; because it is a Point of Law, whether he be liable or no, *viz.* whether the Cloaths were for necessary Apparel of the Wife, without which he is not liable; then the very Custom of *London* excludes Wager of Law in some Actions, as in Debt for Diet, 1 Ed. 4. 6. *Bro. Examination* 18. the Statute of 38 Ed. 3. c. 5. before which no Wager of Law could be against a *Londoner*. *Br. Ley Gager* 94. Another Reason against the waging Law here is, that by Custom of *London* the Common Council may make By-Laws for the better ordering of the City; and that Custom is confirmed by *Magna Charta*, and sundry other Acts of Parliament. So that this being a Penalty so warranted is of too high a Nature to be avoided by a Wager of Law. *Vide* 1 Vent. 196, 261.

City may compel serving of Sheriff.

But

Action cannot
be brought by
Mayor and
Commonalty
in a Court
held before the
Mayor and
Aldermen.

Master and
Brethren of
an Hospital
may present a
Brother to a
Benefice, but
cannot present
the Master.

4 Co. 13.

But another Error assigned is, that this Action is brought by the Mayor and Commonalty of *London*, in a Court holden before the Mayor and Aldermen; and the Record says, that the Mayor and Commonalty of *L.* came before that Court, that is, the Mayor and Commonalty came before the Mayor and Aldermen; so that the Mayor is both Judge and Party, a Thing against natural Justice. And this I hold to be Error; for tho' the Mayor be not sole Plaintiff, nor sole Judge, yet is he essentially Plaintiff and Judge; and the Case of the Bailiff of *Norwich* in 2 *Roll. Ab.* 93. differs from this; one brings an Action before the Bailiff and Steward of the Town, and pending the Action the Bailiff dies, and Plaintiff is made Bailiff, and then Judgment is given for him; that Judgment is not erroneous, because it is given by the Court, and not by him alone; for there the Action is originally well brought, and the Plaintiff was not Bailiff at the Time of the Action brought. But besides, I do not take the Opinion there to be the Resolution of the Court; *vide* 3 *Cr.* 320. that it is not Error, except it be objected to and over-ruled; but sure that is a hard Doctrine, for it might so happen that he had not an Opportunity of pleading it below: But my Reason for that Judgment is, that it did not appear on the Record to be the same Person. But here it does appear on the Record to be the same Person; and that being so, tho' the Action were originally well commenced, yet I take it to be Error. If one of the Aldermen of *London* should bring an Action before the Mayor and Aldermen, and recover, that may be a good Judgment, because it may be a Court of Mayor and Aldermen without him, and the Plaintiff would not be an essential Part of the Court; *vide* 13 *H.* 8. 12. 14 *H.* 8. 2. Master and Confrery of an Hospital may present one of the Brothers to a Benefice, but they cannot present the Master, or infeof the Master: For to that Purpose the Brother who is presented or infeoffed is sever'd from the Body; and tho' the Master have a double Capacity, *viz.* a natural and a political one, yet in one Capacity he cannot do an Act to himself in the other Capacity; but any single Brother may take from the Head and the Remainder of the Brothers, because the Head and the Rest of the Brothers are a perfect Corporation without him; *vide* 3 *H.* 6. 43. but the Brothers are not a Corporation without the Master, who is the Head. And he quoted *Hob.* 87. that an Act of Parliament against natural Equity, as to make one a Judge in his own Cause, would be meerly void.

As to the last Point, he held it a plain Discontinuance, and not amendable, for Diminution not to be alledged in such an inferior Court as this of the Mayor is; that Judgment ought to be reversed for the two last Reasons.

Diminution
not to be al-
ledged in an
Inferiour
Court.

Ward, C. Baron: The Errors assign'd are three, 1st, That the Act of Common Council mention'd, is contrary to the Law of *England* and right Reason. 2^{dly}, That the Defendant ought to have been admitted to wage his Law. 3^{dly}, The general Error, *viz.* that Judgment is given for the Plaintiff, when it ought to be given for the Defendant. And all these three fall under five Considerations; 1st, Whether the Act of Common Council be good to maintain this Action? 2^{dly}, If it be, whether it be brought in the right Court? 3^{dly}, Whether Wager of Law lies? 4^{thly}, If that does not lie, whether Judgment ought to be final and peremptory, or only a *Respondeas Ouster*? 5^{thly}, If all these Points be against the Plaintiff in Error, whether there appear such Error on the Record, for which the Judgment ought to be reversed?

As to the first, The Act of Common Council is a good Ground for this Action, both in Reason, and in the legal Consideration of it; and that has been so adjudged both in the Courts of Common Pleas and King's Bench. The subject Matter of this By-Law is the Power the City of *London* has for choosing Sheriffs for *London* and *Middlesex*, which Franchise is by Royal Charter granted to *London*, whereby a Trust is reposed in the City, that Sheriffs be accordingly chosen; and a Failure therein would be such a Breach of Trust, as would be a good Cause of Forfeiture of their Franchise. And as this Office is of great Trust, so likewise is it an Office of Charge, which makes People unwilling to take it upon themselves; so that there is an absolute Necessity there should be a compulsive Power in the City to enforce some to exercise it, for the Preservation of their Franchise, and Discharge of their Trust. And this By-Law is in Pursuance of this Compulsive Power, and made by the Mayor and Common Council, and by Consequence by all the Freemen, whose Consent is involv'd in that of the Common Council; and they that are intrusted to make Laws for the better governing of the City, are the best judges of the Qualifications of Persons fit to bear this Office, and of the Penalty they shall incur in case of Refusal. And every Corporation in *England* has a Power to make a By-Law for the better ordering and Government of the Corporation, as incident to their Being: And he quoted the Case of *Vanacre*

Ante p. 269.
Salk. 142.

in the King's Bench, and a Judgment upon the Return of a *Hab. Corp.* in this very Case in the Common Pleas.

2d Point, Whether the Action be well brought in the Mayor's Court? The Penalty by the By-Law is limited to the Mayor, Commonalty, and Citizens of *London*, and therefore none can sue for it but the Mayor, Commonalty, and Citizens; then it is limited and restrained to be sued in any of the King's Courts of Record in *London*, and there are two considerable Courts of Record in *London*, viz. the Sheriff's Court, and the Mayor's Court, and in either of these Courts, if the Parties had been proper, this Action might have been brought, and without doubt it might have been brought in the Sheriff's Court.

In the Face of the Record it does appear, that this Action is brought by the Mayor and Commonalty; so it appears here is a compleat Body, and every Corporation aggregate must sue by the Name of the Head and Body, and the Head is essentially necessary. Here the Mayor is the Head, and the Corporation the Commonalty or Citizens of *London*; then who are they that are the constituent Parties of the Court, and we find they are the Mayor and Aldermen; so we find the same Men sue before the same Men, that is, the Mayor and Commonalty sue before the Mayor and Aldermen, viz. the Mayor sues before himself; and that is it which makes the Inconsistency, which is so much the greater, that it is without Necessity, for they might bring this Action in the Sheriff's Court.

And this Objection does not arise from Point of Interest, but from Point of Inconsistency, for an Objection from the Point of Interest would be of no Force; for the Mayor has no greater Share of the Penalty to be recover'd than even the Party Defendant has.

Obj. Tho' the Stile of the Court be before the Mayor and Aldermen, yet they never are there, but all is done before the Recorder, who may or may not be free of the City. It is like a Grant of Conuſance of Pleas to a Man, tho' he himself be Party, which is bad if there be not a Judge appointed; but if another be appointed a Judge, the Grant is good, for the King's Patents cannot enable one to be Judge and Party. *Ans.* This were to take an Averment against the Record, whereby it appears that the Court is held before the Mayor and Aldermen.

Obj. The same Thing was used to be in the King's Bench, when the King sat there upon Pleas of the Crown, as they still may do; therefore this is no material Objection. *Ans.* By the Constitution of *England*, tho' the King sat in that Court

Court, yet the Judgment was given by the Judges, and not by the King. 4 *Inst.* 71, 73. and all Judgments are to be, *per Cur.* And if a Criminal be to be punish'd by Fine at the King's Will, it shall be done by the Judges according to the Law of *England*, and not by the King himself, and that is because that such is the King's Will; and he quoted the Case of 14 *H. 8.* 2. *Bro. Corporat'* 34. before mentioned by *Hatsel.* If the Corporation of *London* give a Letter of Attorney to make Livery, and before it is made the Mayor dies, and after Livery is made before another Mayor chosen, it is ill. *Bro. Corporat'* 63, 64. But if the Mayor had been made, and then a Livery, it had been well, because at the Time of the Livery there had been a compleat Corporation to all Purposes; and an Obligation made by the Commonalty to the Mayor is not good. *Bro. ib.* 4 *Inst.* 213. 12 *Co.* 114. *Ro. Judgm'* 93. That the Chamberlain of *Chester* cannot determine a Cause in which he himself is Party; and here the Mayor of *London* is the chief Plaintiff and the Chief Judge.

The Death of the Mayor causes a Cessation of Jurisdiction of the Corporation till another Mayor be chose. *Vide Dy.* 220. where a Recognizance enter'd into before Sir *N. B.* Keeper of the Great Seal, acknowledging such a Sum due to him and to two more, and held void as to *N. B.* but good as to the rest; and a Judge cannot take a Conusance of a Fine to himself. *Ro. Judgment* 93, 94. *Hob.* 85. *Mo.* 871. 2 *Ro. Ab.* 279, 280. 2 *Ro. Ab. Title Trial.* *Styl.* 107, 130. And tho' many Precedents be of such Actions, yet they pass'd *sub silentio*, and therefore cannot maintain such an Incongruity as here is. And the Case of the Bailiff of *Newcastle*, *Ro.* 89. which is most like this, yet it differs from it in this, that there it does not appear on Record that the same Person was Judge, as here it does.

3. As to the Wager of Law, it lies not here; tho', generally speaking, where the Debt is not grounded upon any Specialty, or Matter favouring of the Realty, it will lie. And he quoted the Case in 1 *Vent.* 261. in Point, and 2 *Lev.* 106. the same Case; but it lies in Debt upon Assignment of Commissioners of Bankrupt. 2 *Cro. Bradshaw's Case*, because the Act of the Commission out of Chancery, nor the Deed of Assignment do not alter the Nature of the Original Debt, but only transfer it as it is; and therefore if the Debtor could have waged his Law against the Bankrupt, he shall still do it against the Assignee. If a Debt arises upon a By-Law authorized by Letters Patent, Wager of Law will not lie in Debt for it. And the Office of Sheriffs of *London*

London and Middlesex is granted to the City by the Charter of King *John*; and a Power of making By-Laws to enforce the Exercise of that Office is necessarily and incidently granted by the same Letters Patent; so this By-Law now in Question is in some respect grounded upon Letters Patent. And my Lord *Coke* says, that Wager of Law is grounded upon the Law of God, which says, that if one leaves an Ox in the Custody of another, and the Ox dies, or is lost, that the Bailor should take the Bailee's Oath of such Death or Loss, to discharge him. And *per Ward*, there is such a Multifariousness of Facts in the Foundation of this Action, that it were very unsafe for a Man to wage his Law in it, and very inconvenient to admit him to; and Judges are to use a Sort of Discretion in admitting People to wage Law. *Vide 5 H. 4.*

4thly, The Judgment ought to be final, for it is an Action of Debt; and the Plea is *Nihil debet*, which is in Bar, tho' the Conclusion be impertinent.

5thly, It is a plain Discontinuance, and no Way to set it right; *ergo Jud. reversetur.*

Holt, C. J. There are several Points in this Case; and as to the first Matter in it, which is the Goodness of the By-Law, I have given my Opinion as to that Point already in the King's Bench, in the Case of City of *London and Wanders*, and it had then the Concurrence of all my Brothers; and since the same Point came in Question in this very Case in the Common Pleas upon a *Hab. Corp.* and that Court did likewise concur with us of the King's Bench; so I wonder it should not be left quiet now, it being so firmly established, that it cannot be otherwise shaken but by the Lords in Parliament.

Where one wages Law, instead of concluding to the Country, Judgment final shall be. Judgment of *Respondeas Ouster* is only where there is a dilatory Plea, to the Jurisdiction, or in Abatement of the Writ.

Then as to the Point, whether Judgment final ought to be, or an Answer over; sure it must be a Judgment final, for since he pleads a *Nil debet*, and instead of concluding to the Country he concludes to wage his Law; if he ought not to be admitted to that, without doubt he ought to have final Judgment; and there is no Colour for a *Respondeas Ouster*, for there never is a Judgment to answer over, but where there is a dilatory Plea pleaded, or to Jurisdiction of the Court, or to abate the Writ.

So in this Case there are three Things observable; 1st, Whether upon an Action brought upon this Act of Common Council for a Penalty incurr'd, or supposed to be incurr'd upon it, there ought to be a Wager of Law? 2dly, Whether upon this Record, as certified to us, there does appear a

Discontinuance? *3dly*, Whether, upon Certificate that the Record below is amended, we may amend the Record before us by the Record set right below? *4thly*, Whether this Action be well, brought by the Mayor, Commonalty and Citizens of *London*, in the Court of the Mayor and Aldermen.

As to the Defendant's Attempt to wage his Law, I hold his Plea ill concluded, for he ought to conclude to the Country, for these Reasons, *1st*, Tho' it be a Debt not founded upon a Specialty, yet the Foundation of the Action is the Wrong of the Defendant; he is guilty of a Wrong in refusing Obedience to this act of Common Council, for he has not done what the Act required him to do, that is, take an Oath of his Insufficiency, or pay down his Fine, or assume the Office according to the Act; so that his Non-compliance with this Law, by which he was bound, is the Wrong which is the Foundation of this Action. And whenever a Man is charged with a Penalty for an Injury or Wrong done by him, or Act of Disobedience done by him, he cannot wage his Law. Whenever a Man is charged with a Penalty for a Wrong done, Wager of Law lies not. And this is the Reason of *Slade's Case*, which was an Action for Money for Goods sold and delivered; and this the right Difference, and not that which is made in the Actions, *viz.* that it lies in one Sort of Action and not in another; but the true Difference is when it is grounded on the Defendant's Wrong, &c. and when not; for if Debt be brought, and that the Foundation of the Action is the Wrong of the Defendant, Wager of Law will not lie.

The Statute of — R. 2. gives Debt against a Sheriff for Escape of a Prisoner in Execution, and the Words of the Statute are, that the Plaintiff shall have Debt and recover the whole Sum in Judgment, yet upon that Statute Wager of Law was never attempted, and the only Reason is, because the Debt arises from the Wrong of the Defendant, who by suffering the Escape, to the Prejudice of the Plaintiff, brought this Penalty upon himself; and for that Reason it being merely grounded upon the Defendant's Wrong, if he dies the Action dies with him, and will not lie against his Executor, *vide Dy. 322. pl. 25.* So in Debt upon the Statute of *Ed. 6.* for Substraction of Tithes, Wager of Law will not lie; and in that Case too Debt will not lie against an Executor, because it is a Penalty arising from the Wrong of the Party, which dies with him. So if Debt be brought against an Executor upon a *Devastavit*, no Wager of Law lies; and why so? because it is an Action brought upon the Wrong of the Executor in Wasting, and for that Reason it

is, that it is brought in the *Debet ac detinet*; and tho' that Action lies not against an Executor, but after a Judgment for the original Debt, nor against the Sheriff till after Judgment and Execution; yet it is not the Record of the Judgment, but the Wrong of the Executor in Wasting in one Case, and of the Sheriff in suffering the Escape in the other, is the Foundation of the other.

Every By-Law is of equal Validity as an Act of Parliament to Persons within the Jurisdiction.

Originally Plaintiff might compel Defendant to Wager of Law.

So in this Case it is plain he is guilty of a Wrong in not obeying the Act of Common Council, for it is a Law in *London*; and every By-Law is a Law, and as obligatory to all Persons bound by it, that is, within its Jurisdiction, as any Act of Parliament, only with this Difference, that a By-Law is liable to have its Validity brought in Question, but an Act of Parliament is not; but when a By-Law is once adjudged to be a good and reasonable By-Law, it is to all Intents as binding to those that it extends to, as an Act of Parliament can be. *2dly*, Wager of Law does not lie here in respect of the Defendant himself, upon two Accounts. *1st*, If he were admitted to discharge himself by Wager of Law of a Debt arising thus from his own Wrong, it would be a great Temptation to corrupt Perjury, and the Law never leads Men into Temptation; and I am afraid the Penalty of four Hundred Pounds would be too great a Temptation to some People. *2dly*, Tho' generally Wager of Law be look'd upon as a Privilege the Defendant has, but originally it was not only a Privilege of the Defendant to discharge himself, but one which the Plaintiff had when he had no Witness of his Debt, to put the Defendant under a Necessity of giving him his Oath to discharge him; so it was a Kind of an Equity in Law, that the Plaintiff might put him to take his Oath that he owed nothing to him, or confess the Debt, rather than the Plaintiff should lose his Debt in Cases where he had no Witnesses of it at all, or had some who were then dead. *Magna Charta, c. 28.* makes this very manifest; the Words are *Nullus ballivus de cetero ponat aliquem ad legem manifestam, nec ad juramentum simplici loquela sua, sine testibus fidelibus ad hoc inductis*; where Note the Words *de cetero*, which shew that before that Time the Law was, that if a Man had brought an Action against another without any Witness, he might put the Defendant to his Oath, whether he owed not the Debt, and that was thought hard; and to prevent it this Statute was made; but the Witnesses mention'd by the Statute are not to be produced after Issue join'd or to be cross-examined, but only to give Proof of a probable Cause of Action; that is, such Proof as we now

require of a *Modus decimandi*, when we grant a Prohibition to stay a Suit for Tithes in *Specie*. And upon bringing such convenient Proof by credible Witnesses, and averring the Statute of *Magna Charta*, a Plaintiff may at this Day compel a Defendant to wage his Law. In 33 H. 6. 8. in a *Procepe quod reddat*, the Tenant made Default, but appear'd on the Return of the great *Capias*, and pleaded Non-summons, and would conclude to the Country, where the proper Trial was, by Wager of Law of Non-summons; and the Question there was, if he could wave his Plea of Wager of Law, and betake himself to Plea concluding to the Country; and the better Opinion there is, that he could not put himself upon his Country, and decline his Wager of Law. And that Case is plainly out of the Statute of *Magna Charta*, because it is not Debt, nor *simplex loquela*, but a Process of Non-summons from which he was to save himself; therefore since this Action is grounded upon the Defendant's Tort, it would be hard to put the Defendant to wage his Law; for it were too great a Temptation to save the Penalty of 400 *l.* and the Law of *England* does abhor People's Swearing, when they are charged with a Crime or Offence. Indeed when the Popish Clergy did prevail, they did introduce an Oath *ex officio* to make People swear when they were charged with a Crime of Ecclesiastical Conusance; but that Practice was always look'd upon as an Inroad upon the Right of the People. *Vide* 12 Co. 26. and other Authorities mentioned there.

Another principal Reason why a Wager of Law will not lie in this Case is, because the Act of Common Council, by which this Duty is created, is notorious and publick; it is the Law of the City of *London*, of which every Body within the City must take Notice; and the Secrecy of the Contract which raises the Debt, is the Reason of the Wager of Law; but if the Debt arise from a Contract that is notorious, there shall be no Wager of Law; and so is the Reason of the Diversity between these two Cases, of an Action of Account brought against a Receiver; for if it be against him as Receiver by the Hands of the Plaintiff, a Wager of Law will lie; but if he be charged for Money received by the Hands of a third Person, no Wager of Law shall be allowed; because it appears from the Nature of the Action that a third Person can prove the Receipt; and the Action in our Case is brought upon the Act of Common Council, and other publick Transactions, which are publickly known; *ergo a fortiori* Wager of Law is not receivable.

But

Ante p. 196.
Plaintiff, on
bringing con-
venient Proof,
and averring
Magna Char-
ta, may com-
pel Defendant
to wage his
Law.

(2)

Secrecy is the
Reason of wa-
ging Law, and
therefore can-
not be in re-
spect of a By-
Law, which is
notorious.

Wager of Law
will lie in Ac-
count by Re-
ceiver for Mo-
ney received
by the Plain-
tiff, but not by
a third Person.

But if in Detinue the Bailment be by another Hand than the Plaintiff's, yet the Defendant shall wage his Law: And the Reason of the Diversity is, that in a Declaration in Detinue the Bailment is no necessary Ingredient, and the Plaintiff by alledging an unnecessary Thing shall not bar the Defendant from the Benefit of waging his Law. For if in Detinue the Defendant should plead *Nihil detinet*, and put himself upon the Country, and upon the Trial it appeared that the Defendant found the Goods, instead of having them by the Bailment of a third Person, yet the Plaintiff shall recover; so the Gift of the Action is not the Delivery of the Goods, but the Detainer is the only material Part of the Action; and the whole Point is, whether he detained the Goods; and that is a Matter of Secrecy.

The Reason why Wager of Law lies on Award, if Submission be by Parol, is, that the Submission is the Ground of the Action.

Vide Sav. 74.

And he quoted 1 *Inst.* 295. that Wager of Law lies in Debt upon an Award, if the Submission be by Parol; which was urged to be grounded upon a notorious Transaction, and by the Interposition of Strangers. But *per Iury*: The Award is not the Ground of the Action there, but the Submission, which may be in private; for an Award without a Submission would be void, and therefore the Submission is the Ground-work, and what raises the Duty: But the principal Case here is not like any Case in our Books, where a Wager of Law is allowed. As to the Case of the Corporation of Glaziers, which is relied on as a parallel Case, admit that Case to be Law, (as I shall demonstrate it is not by and by,) it is nothing like this Case: For the Company of Glaziers brought an Action upon a By-Law made by them, to which the Defendant pleaded *Nihil debet*, and put himself upon his Law, and so had Day given him to wage his Law; so it never came before the Court judicially to determine; but if that were Law, there would be a vast Difference between that Case and this; for a By-Law by a whole City, or other Town Corporate, is what all People that live or come within such City or Town are bound to take Notice of, without any more a-do; but a Law made by a particular Fraternity, or Company within a City or Town, none but the Members of the same are bound to take Notice of. 1 *Bulst.* 11. And sure a By-Law by the Company of Glaziers in *London*, which only binds their own Members, and is only for the better Government of that private Society, is not to be compared to a By-Law by the Common Council of *London*, or by any other Corporation of a publick Concern. In 18 *Car.* 2. upon the Act of Common Council for restraining the Number of Carts in the City;

and

and an Action brought for the Penalty for Breach of that Law, the great Objection was, that the Party had not Notice of the Law, he being no Member of the Corporation; yet it being a Law of the City, it was ruled, that every one that came into the City was bound to take Notice of it: And this Case differs therefore from all the Reasons and Authorities quoted concerning Wagers of Law. Then as to the Case of Amerciament in a Court-Baron, where it is said, that in Debt upon a Judgment in such a Court, Wager of Law will lie; which my Brother *Hatsell* allows to be Law, and alledges for Reason of it, that they are Matters of small and private Concern, but only for a trifling Sum of 40s. and the Amerciament is only for small Things, for the Benefit of the Lord, and not worth giving the Country Trouble to come to try them. But I must own I am not satisfied, that a Wager of Law will lie in that Case, for two Reasons, one which concerns the Plaintiff, and the other the Defendant; for the Plaintiff, now after the Recovery, he has sufficient Proof to make out his Cause of Action; and now it ceases to be a Matter of Secrecy, being grounded upon a judicial Proceeding of a Court at Law, and why then should he be put to lose his Debt by a Wager of Law of the Defendant; for now it is not Matter of that Secrecy that requires a Wager of Law. And the Defendant now has a Judgment against him, suppose upon the Oath of Witnesses; and he might have waged his Law in the original Suit below, and that he omitted to do, but let Judgment go by Default, or otherwise; and shall he now by his Oath be admitted to falsify that Judgment of a Court that had Jurisdiction? Sure he shall not, nor is there any Reason for it.

In many Cases, where there are no Deeds or Specialty, no Wager of Law will lie. In Account upon Receipt by the Hands of a third Person it will not lie; or if it be brought against the Bailiff of a Manor it shall not lie; because, says the Book, that is in the Realty; and what is that to say? It is, because it is notorious to the Country; because the Country takes Notice of his looking after the Manor, and they have thereby an Opportunity of knowing that he has received his Rents, &c. So in Debt upon a Contract for a Sum in Gross, Wager of Law will lie; but if Debt be brought for Rent due upon a parol Lease, it will not lie; and the Reason is, because it is in the Realty, and arises from the taking the Profits of the Land, and Occupation of it in the Country; and so the Notoriety of the Thing excludes the Defendant from waging his Law; and it is ridiculous to say,

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that

Holt doubted whether Wager of Law would lie on Debt on a Judgment for Amerciament in a Court-Baron.

In Account against Bailiff of a Manor, Wager of Law will not lie.

that Wager of Law will lie in Debt upon a Judgment in a Court-Baron, because the Money might be paid in private; for that would be a Reason to wage Law in all the Cases before put; but it is to be considered, that it is not the Privacy of the Payment, or the Possibility thereof, that is the Occasion of a Wager of Law, but that the Ground of the Action is secret; as if Debt be brought upon a Bond, with Condition for the Payment of Money, the Money may be paid privately, and thereby the Bond is discharged, if Payment could be proved; and yet in Debt upon such Bond Wager of Law will not lie, because the Contract was by Specialty; tho' the Bond may be discharged by Payment, and that the Payment might be private; so it is plain the Possibility of private Payment will not intitle one to a Wager of Law. And the Reason is the same here, for the Duty arises upon a solemn Act made by the City assembled in their Legislative Capacity, and that is very notorious; and what then can intitle him to wage his Law, but the Possibility of Payment in private; yet if the Foundation of the Action be publick and notorious, that shall never do it. There was a Case in the King's Bench, 29 Car. 2. Rot. 92. where it was held, that if Debt be brought upon a Recovery in a Court-Baron, the Defendant may wage his Law. And that is the only Case of any such Judgment or Authority that I meet with in the Books; except it be the Opinion of 49 Ed. 3. 3. which I value very little; the Case was Debt upon Account stated before Auditors, upon which it appeared that Money was due to the Plaintiff; there it is said, that in case Money be recover'd in a Court-Baron, and Debt be brought upon that Judgment, the Defendant may wage his Law; but who says this? Not the Court, but the Counsel at the Bar; and if you consider all that the Counsel said, you will no more take it to be Law than to be Gospel; for they say, that for Debt upon a Recovery in a Court-Baron, or in a Franchise, a Wager of Law would lie; and what is meant by Franchise is commonly a Court of Record; for if the King by Letters Patent grant a Franchise to hold a Court within such a Precinct, it will be intended a Court of Record; for the King cannot grant a Franchise to hold a Court-Baron in Gross. And in Truth in that Case the whole Court were under a great Mistake; for it being Debt upon Account stated before Auditors, Wager of Law is therein taken away by the Statute of *West. 2. c. 11.* whereby Auditors have Power to fine and imprison, *which necessarily makes them a Court of Record*; and therefore no Wager

2 Inst. 380.
Sav. 115. cont.
Vide Sav. 83.
That Eccle-
siastical Com-
missioners may
fine and im-
prison; yet
that they are
not a Court
of Record.
Ante p. 388.

of Law can be in Debt upon such Judgment; and by Consequence no Strefs to be laid upon the Authority of that Book. But 34 H. 6. 49. *Br. Ley Gager* 11. is of great Authority; if Debt be recovered in a Court of Antient Demeſne, and an Action be brought upon that Recovery, no Wager of Law will lie againſt it; yet a Court of Antient Demeſne is no more a Court of Record than a Court-Baron is; and no Difference in this Reſpect can be made between the two Courts. And therefore if Wager of Law does not lie in one, as the Authority of that Caſe is full that it does not, none will lie in the other.

Court of Antient Demeſne
no Court of Record.

There are two Caſes mentioned in *Pinchon's Caſe*, 9 Co. 88. concerning Wagers of Law, and the Reaſon thereof. 1^{ſt}, If one retain a Painter, or other Workman, to ſerve him, who after brings Debt for his Wages, the Maſter ſhall wage his Law; but if it be a Retainer upon the Statute of Labourers, he ſhall not wage his Law; and the Reaſon given by the Book is, becauſe in the Caſe of the Statute he is compellable to ſerve; but ſure that can be no Reaſon, for tho' he be bound to ſerve, the other is not bound to take him; but the Reaſon is, becauſe it is hard the Maſter ſhould be put to wage his Law, but rather that the Plaintiff ſhould be put to prove his Retainer by the Statute. Another Caſe is 28 H. 6. 4. b. one was a Priſoner in the Tower for High Treason, and the Lieutenant finds him Meat and Drink, and for this brings Debt, and the Defendant was denied his Law; and Co. in his 9 Rep. *ubi ſupra*, gives for Reaſon, that the Lieutenant was bound to find his Priſoner with Meat and Drink; but that is not Law, for the Gaoler is not bound ſo to do; *vide Pl. 68. a.* And it is for the Benefit of the Priſoner that he ſhall not be put upon it, for the other muſt make out his Charge, and not put the Defendant to his Oath. And another Reaſon why he ſhall not wage his Law is, becauſe, while the Priſoner is in his Charge, the Gaoler cannot take any Security for his Victuals from himſelf; for a Bond from him in that Caſe would be *ipſo facto* void; and *ergo*, ſince he is diſabled from taking a Security from the Priſoner, but barely his Promiſe, it were hard to allow the Priſoner to clear himſelf by his Oath. Another Reaſon why Wager of Law ſhould not be allowed here is, that every By-Law is grounded upon Charter or Preſcription; if it be Matter of Record, it leaves no Room for a Wager of Law; and if it be by Preſcription, it is Time out of Mind, and no Man living can ſwear that off, or deny a Preſcription upon Oath. It is true, a Preſcription is capable of Proof, by ſhewing a Uſage of ſuch a Thing by antient

(3.)

(4.) antient Witnesses, which is an Evidence only of a Prescription. 1 *Vent.* 261. Wager of Law was denied in Debt for Scavage arising by Prescription. And lastly, a Wager of Law will not lie here, because this Act of Common Council does not affect the Defendant only, but all the whole Body of the City; and there is no Case, where there is a Penalty, to which all the Men within such a Jurisdiction, Precinct, or City are obnoxious, that a Wager of Law was allowed; and this answers all your Cases of Recoveries and Amerciaments in Courts; for there none is affected but one; but this Law is made to extend to the whole Community of the City for all Generations to come, and for ought I know to the Day of Judgment. Now as to the Case of the Company of Glaziers before put, it is true so far, as it was a Debt for the Recovery of a Penalty inflicted by a By-Law, it is like this Case, and a Precedent for it; but how happened that Matter. 1st, It was allowed by Counsel on both Sides, and the Court never heard of it but once upon a Motion, and Admission of the Counsel of both Sides; so it was a Gudgeon swallowed, and so it passed without Observation. And the Case in *Co. Ent.* 118. is very like this; Debt was brought for a Fine set upon the Defendant by the Homage at the Court-Baron, grounded upon a Custom to make Laws for regulating their Common, and inflicting a Penalty on such as did inclose at inconvenient Times; and a Wager of Law was offered there, and Judgment is there for the Defendant; for of Common Right the Homage has no Right to impose a Penalty for such private Offences, but it is only by Custom that they can do it; *vide* 5 *Co.* Chamberlain of *London's* Case. *Mo.* 276. 1 *Leon.* 203. The Case indeed is not well reported, but upon comparing both the Books together it appears the Wager of Law was not admitted in that Case.

If Case in City-Courts be not continued, it is a Discontinuance, and not amendable.

2. The second Point considerable is whether here be a Discontinuance, and surely it is, for it appears that the Defendant came into Court, and appeared to a Plaint levied against him the 15th of *November*, and his Bail was given to appear at the next Court, which was held the Day following, *viz.* the sixteenth, but there is no Day given to him on Record, or to the Plaintiff, to appear on the sixteenth; but presently after Bail taken, there is Day given to the 20th of *June*, and every Case ought to be continued from Court to Court, as in *Westminster-Hall* from Term to Term, if it be not a real Action, where long Process is allowed. *Vide* 21 *H.* 7. 16. Discontinuance is Error by the Common Law; but by the 32 *H.* 8. c. —. it would be cured, if it

were after Verdict; but this is upon Demurrer. So the next Thing considerable is, whether this be amendable? and sure it is not; for it is such a Misprision as is not amendable by 14 *Ed.* 3. c. 6. or 8 *H.* 6. c. 12. for these Statutes do not extend to amend any Record but in Errors, which are the Misprision of Clerks in making their Entries on Record; but a Discontinuance is a Fault of the Court, and that never was amended by any of these Statutes; and many Judgments have been reversed for it, as in 2 *Cro.* 211. If a Court once give a Judgment they cannot after amend, 3 *Cro.* 412. *Ireland's Case*, *Yel.* 169. 2 *Cro.* 260. 3 *Cro.* 619. And if a Discontinuance were amendable by any of these Statutes, there had been no Need of the Statute of 32 *H.* 8. — that supplies the Want of Continuance after Verdict. But if the Record below be well, why may not we amend by that? And tho' the Court below be not of as high a Nature as the Courts of *Westminster-Hall*, the Grand Sessions of *Wales*, or the County Palatine, yet if the Record below had been originally well, and this Fault had been only a Slip in the Clerk in transcribing, we ought to amend it, by the Statute of 8 *H.* 6. for the Record being well below, the Omission was in the Clerk; and tho' the very Record be that which we have here, yet if it had appeared to us to have been well below, we ought to have amended by it. In the King's Bench, in Error of a Judgment of an Inferior Court, upon the Record certified it appeared there were but eleven Jurors, which was the fatal Error; but the Book of the Inferior Court, where the Names of the Jurors were entered, was produced, and Oath being made that the twelve there entered were sworn of the Jury, the Record was amended by that Book; but here we find that the Record was originally bad below, and amended below as soon as the Exception was taken here. And in every Day's Practice, if the Record entred on the Roll be ill, yet if the Paper-Book in the Office be well, we give them Leave to amend by the Book in the Office; but if the Paper-Book be originally ill, and clandestinely amended, there we never let them amend the Record by it.

Obj. You will give Credit to our Record, as if it were in *Westminster Hall*, if the Roll be amended by the Court of Common Pleas or King's Bench, when Error is in the Chequer Chamber. *Ans.* Those Courts will amend nothing but what is amendable by Law, or at least it must be presumed they will not do it; besides, when in those Courts they amend the Matter below, they come into the King's

No *Certiorari* lies to the Mayor's Court.

Bench and alledge Diminution, and thereupon the Record is certified up, and then the Court above can never tell whether they have amended or not; if they certify it up upon Diminution alledged, it will do well enough, and we shall not suppose they have done amiss. But no *Certiorari* lies to this Court of the Mayor, and that is the Case of *Green and Cole* in 2 *Saund.* 252. 1 *Lev.* 310.

3. The third great Point, is the Manner of bringing of this Action, to which there were two Exceptions taken; the first is to the By-Law, that it inflicts a Penalty for the Benefit of those that make the Law. But that Point has been already settled, and the By-Law notwithstanding adjudged good; and the Truth is, that Objection has not Weight enough in it to require an elaborate Answer; for we must consider the City of *London*, as all other great Towns are to be considered, a great Community that have a Legislative Power intrusted to them for their better Government, and can make Laws to bind the Property of those that live within that City or Precinct, and also of all Strangers whatsoever that come within the Limits of their Jurisdiction; and it was necessary and convenient they should have such Power for the Support of their Government; and it is so in all Countries and Forms of Government whatever, whether Monarchy, Aristocracy, or Democracy, or whatever Order of Government it be; for the Supreme Jurisdiction cannot have Leisure to inspect into the small Matters that concern the whole Order and Regulation of Matters within that Society or Community, as they that are Members of it shall. *Vide Baulieu de rep. c. 2.* *Hob.* 221. says that all Corporations, as such, have Power to make Laws and Ordinances, and need not special Words in their Patents to enable them thereunto. And if they have Power to make Laws, of necessary Consequence they must have a Power to inflict a Penalty for the enforcing of that Law; and here in *England* it must be a Pecuniary one, for a Corporal one it cannot be by the Law of *England*, it being against *Magna Charta*, without a special Custom. And this Pecuniary Penalty must be levied by Distress, or Action of Debt; for there can be no other Remedy. And sure it can be no Exception, that this Penalty goes to the Use of the Body Politick, for it is most reasonable it should be so; for it is in Nature of Damage for an Injury done, and that Injury is done to the Body Politick, whose Laws are broke and despised, and therefore it is fit they should have the Penalty; and to say that one who is free of the Corporation should not be Judge, because

Bodia.
All Corporations, as such, have Power to make By-Laws.

Penalty of By-Laws may go to the Corporation.

he is to have Share of the Penalty, is as ridiculous as groundless: And since this Objection has had so little Regard with us in the King's Bench, I wonder it should be so much insisted on now, especially since it has been also rejected in the Common Pleas. I agree, where the City of *London* claims any Freedom or Franchise to itself, there none of *London* shall be Judge or Jury, for there they claim an Interest to themselves against the rest of Mankind; but here is only an Act of Government to exercise a Power which they have by Law. And it is not to be imagined that the Aldermen of the City, in Kindness to the Body Politick, would oppress the rest; and the Freemen, who should try the Fact, would be themselves obnoxious to the like Penalty in Time, and in their Turns; and if there were any Room for a Presumption, it would be that they would favour private Persons against the Body Politick, in regard of their own private Interests, which would be concern'd next Time.

Where Corporation claims a Franchise, shall not be Judge or Jury in Dispute about it.

But the true great Point is, that the Court is held before the Mayor and Aldermen, and the Action brought in the Names of the Mayor and Commonalty; and that very Man, who is Head of the City, and without whom the City has no Ability or Capacity to sue, is the very Person before whom the Action is brought; and this cannot be by the Rules of any Law whatever, for it is against all Laws that the same Person should be Party and Judge in the same Cause, for it is manifest Contradiction, for the Party is he that is to complain to the Judge, and the Judge is to hear the Party, the Party endeavours to have his Will, the Judge determines against the Will of the Party, and has Authority to enforce him to obey his Sentence: And can any Man act against his own Will, or enforce himself to obey? The Judge is Agent, the Party is Patient, and the same Person cannot be both Agent and Patient in the same Thing; but it is the same Thing to say that the same Man may be Patient and Agent in the same Thing, as to say that he may be Judge and Party; and it is manifest Contradiction. And what my Lord *Coke* says in *Dr. Bonham's Case* in his 8 Co. is far from any Extravagancy, for it is a very reasonable and true Saying, That if an Act of Parliament should ordain that the same Person should be Party and Judge, or which is the same Thing, Judge in his own Cause, it would be a void Act of Parliament; for it is impossible that one should be Judge and Party, for the Judge is to determine between Party and Party, or between the Government and the Party; and an Act of Parliament can do no Wrong, tho' it may do several

Litt. §. 212.
1 Inst. 141.
Hob. 87.
Person cannot be both Party and Judge.

Vide 3 Inst.
38. Steward,
Comptroller,
&c. of King's
Household
shall try one
for conspiring
his own
Death.

several Things that look pretty odd; for it may discharge one from his Allegiance to the Government he lives under, and restore him to the State of Nature; but it cannot make one that lives under a Government Judge and Party. An Act of Parliament may not make Adultery lawful, that is, it cannot make it lawful for *A.* to lie with the Wife of *B.* but it may make the Wife of *A.* to be the Wife of *B.* and dissolve her Marriage with *A.*

Obj. My Lord Mayor, as he is Head of the Corporation, acts in his Politick Capacity, and judges in his Natural Capacity. It is true he acts in different Capacities, yet the Person is the same, and the Difference of the Capacities in which he acts, does not make a Difference; as the Bishop of *London* has two Capacities, one as Bishop, the other as *I. S.* but he cannot do an Act in one Capacity to inure to him in another Capacity; as he cannot make a Lease for Years as he is Bishop, to himself as he is *I. S.* nor *vice versa.*

Obj. It is an invisible Body Politick: It is true, but the Head is visible as the Bishop is, and he is the most conspicuous Part of the Corporation, and that without which there would not be a Corporation existing; and it is impossible to get over the two Judgments in *Henry VIIIth's* Time, before cited by my Brothers: The Master and Confrery of the Hospital had the Presentation to a Rectory; they under their Common Seal present their Master, without taking Notice that he was their Master, and it was held to be a void Presentation, and that Judgment was after affirmed upon Writ of Error; and in that Case the Difference is taken between presenting one of the Members, and presenting the Master; for if they had presented one of the Members, it had been well; for if that Member were set aside, yet still it would be a Corporation. And when they present a Member, it is a Setting aside, or an Exclusion of him for that Purpose from the Corporation; but if the Master, who is the Head, be set aside, then it ceases to be a Corporation, and by Consequence cannot do any Corporate Act, and then their Presentation is void; so if this Court could be before the Aldermen without the Mayor, then this Action might be well brought; but as, if the Chief Justice of Common Pleas brings an Action in the Common Pleas, as it is his Privilege to do; yet there he must not be named in the whole Proceedings but as Plaintiff, and not so much as the *Placita* shall be said to be before him, for then it would be Error; and the *Placita* shall be *coram Ed. Nevill, Joanne Powel & Joanne Blincow*; and if he take out the Writ it must not

be so much as tested in his own Name, but in the Name of the next Senior Judge: So here, since the Court cannot be held without a Mayor, this Action which is brought in his Name cannot be brought in that Court, and the Lord Mayor is a necessary Constituent Part of the City; *vide* 21 *Ed.* 4. 15, 151. 17 *Ed.* 3. 48. A Burgeſs of a Corporation had laid out Money for the Use of the Corporation, and after being Mayor, took the Bond of the Corporation for it to him in his natural Capacity, and held void. And he allowed the Case in 2 *Ro. Ab.* — before cited, to be good Law, but utterly exploded the Reason given there; the Case was, A Member of a Corporation brings an Action in the Mayor's Court, and after the Plaintiff was chosen Mayor, and then Judgment for him, and a Writ of Error brought, and the Judgment affirmed; because, says the Book, the Judgment was not given by him alone, but by the Court; but if he be in the Stile of the Court, he is a Judge of the Court, and it cannot be a Court without him. And tho' my Lord *Roll* was a very learned Man, and that his Abridgment was publish'd by my Lord *Hale*, perhaps the greatest Man of the Law that ever was, yet this Reason might be overlook'd by him; however, it is plain this Reason is a senseless one, but the true Reason is to be seen in 2 *H.* 4. 40. If *A.* sue in the Court of Mayor and Bailiffs, *A.* is made Mayor, and it is not said in the Record that he was made Mayor, or it do not appear in the Record that he was made Mayor, there if the Defendant do not come to the Court below, and plead this Error in Fact, he shall never after assign it for Error; but if he had pleaded this Error in Fact, and had been over-ruled in it, he might have a Writ of Error; for one shall never take Advantage of an Error in Fact, where he had an Opportunity of pleading it; that is, if it be such an Error in Fact as does abate the Writ; and if it be such an Error in Fact as does happen after the Time of Pleading is out, then the Way is to bring an *Audita querela*; as if after Verdict between the Day of *Nisi prius* the Plaintiff release to the Defendant, he cannot plead it in Bank, but must have Recourse to an *Audita querela*; and if this Exception had been taken upon the *Hab. Corp.* in *Westminster-Hall*, it would not have hindered a *Procedendo*, because it was an Error in the Proceedings. And the *Hab. Corp.* is only to know the Cause of Detainer of the Party in Custody, and what is then to be judged of is only the Return of the By-Law; and if that

be good, we must remand, for to enter into an Examination of the Proceedings, would be to preclude the Plaintiff before his Time.

The Court is held before the Mayor and Aldermen, tho' the Recorder acts as Deputy.

Obj. Tho' the Mayor be named in the Plea, yet the Recorder is Judge, and that we must take Notice of as Judges by Commission here in the City; where we are as much bound to take Notice of the Customs of the City and its Courts, as we should take of the Customs of the Courts of *Westminster-Hall* when we sit there. *Answe.* The *Placita* are virtually held before the Mayor and Aldermen, tho' in Fact the Recorder acts, and is as a Deputy; and the Steward of a Court who has a Deputy cannot sue in the Court before his Deputy; and a Deputy acts, and of Right ought to act, in the Name of his Principal. *Et per omnes Jud. revesetur.*

F I N I S.

T H E

T A B L E

O F T H E

Principal Matters.

Abatement of Actions and Writs.

Misnomer may be pleaded in Abatement without a *Venue*; for as it concerns the Person, must be tried where the Action is brought. *Page 195*
 Defendant defended *vim & Injuriam*, cannot after plead Misnomer, or to the Jurisdiction. 235
 Misnomer should not be pleaded by Attorney; but if such Plea by Attorney be received, will not be Cause of Demurrer. 273
 Trespass for Battery of Servant, Plea, that did not appear he was so when Battery committed, and *Petit judicium de Billa*, such Plea ought not to be received; and *Respondeas ouster*. 399

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Coverture may be pleaded in Abatement generally without a *Venue*; *aliter* if in Bar. *Page 503*
 If Rules of Pleading are not out, may plead in Abatement in a subsequent Term. 504, 522

Abatement of Quittance. Vide Quittance.

Acceptance. Vide Tender and Refusal.

Account. Vide Merchant.

If *A.* gives a Note to *B.* to receive Money from *C.* and *C.* discharges *B.* of a Debt he owed him, Account lies against *B.* 509

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Action on a Tort and on a Contract cannot be join'd. 73

Local Action must be brought where Fact arose, unless by Consent. 399

Action for false Return is local, but may be laid either where the Return was, or where it is of Record. 408

Action for a false Return to a *Mandamus* may be brought either where the false Return was, or where it appears of Record, at the Plaintiff's Election; and being a local one must be brought in one or other, 515

Transitory Actions Defendant may transfer to the right County, unless Plaintiff will be bound by Rule to give material Evidence where the Action is laid. *Ibid.*

After Recovery of Damages in Assault and Battery, no Action will lie for consequential Damages; for when Damages are recovered it is according to the Damage sustained, and to be for entire Satisfaction. 542, 543

ACTIONS on the Case.

Per Holt: Of late it is held that Case will lie for Prosecution in inferior Court, which has no Jurisdiction. 4

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Case lies against Post-Master for not delivering a Letter on Request, tho' no particular Damage accrued; but if the Letter had been tender'd, and the Plaintiff would not first pay Postage, he is not bound to deliver it. Page 6
Pro opere & Labore, not saying what, good. 50

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Disceit will lie against a Man who sells Goods, knowing they are not his own, if recovered against the Vendee. 245

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Case for false Return to a *Mandamus*, need not alledge it belonged to them to do it, for by making a Return admit it. 322

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349, 371

Case by Master of a Ship against a Person who distrained Corn, with which the Ship was freighted, whereby he lost his Voyage, will lie; or he may have Trespass, and declare on his Possession.

381, 382

Action for false Return is local, but may be either where the Return was, or where it is of Record.

408

Case against the Post-Master General for Loss of Bill delivered at the Office, and lost there, will not lie, *per* three Judges against *Holt*.

472, 473

Where a Person takes upon himself an Office for the Publick Benefit, he is liable for it; *per Holt*.

479, 480

Inn-keeper is only liable for the Goods of a Guest.

480

Action lay against Carrier before the Law gave him Remedy against the Hundred.

482, 483

Action lies against a Smith for refusing to shoe a Horse.

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So against a Carrier for not carrying Goods, if he be not loaded.

Ibid.

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Case will lie against Sheriff for not returning good Issues on a *Distringas*.

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Actions on the Case on *Assumpsit*.

Assumpsit for Money due not good, unless shews a Contract, or for what.

16

General *Indebitatus Assumpsit* will not lie for Money won at Play, tho' it will against the Person who holds the Stakes.

69

Assumpsit by a Man against a Woman, that in Consideration he promised to marry her she promised to marry him, lies.

214

But if the Man is unable to perform it by Reason of Consanguinity, &c. she may discharge herself of it by giving it in Evidence on *Non Assumpsit*: *Per Holt*.

Ibid.

Assumpsit in Consideration that *A.* would deliver Goods to *C.* he *B.* would see him paid, held a good *Assumpsit*; but if such Promise made after the Delivery of the Goods *aliter*; *per Holt*.

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General *Indebitatus* for Money won at Play will not lie, for it is no more than *nudum pactum*; there must be special mutual Promises.

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On *Indebitatus Assumpsit* it is no Plea, that had committed an Act of Bankruptcy.

267

On special *Assumpsit* for Money won at Play, shall be special Bail.

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Indebitatus lies for Rent received from a Person's Tenants, under Pretence of Title. *Ibid.*

Bond is a Discharge of *Assumpsit*. 406

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In *Indebitatus* if a Count be for Money received to Defendant's Use, it is ill. 495

Assumpsit will not lie where a Contract is varied, but a *Quantum meruit*. 509

Indebitatus for Money received to Defendant's Use, held well after Verdict. 510

In Debt a Promise is never laid, but in *Assumpsit* the Cause of the Promise must be expressly shewn; for it might be on a Specialty, or for Rent where *Assumpsit* will not lie. 511

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Indebitatus Assumpsit by an Under-Officer for Pay received by superior Officer. 521

To *Indebitatus Assumpsit* Plea of Account not good. 537

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not be discharged without Deed or Satisfaction. Page 538

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All popular Actions on Statutes made before 21 Jac. 1. must be in the County where the Fact was done. *Per* ten Judges. 223
 In all Actions on Penal Statutes common Bail suffices. 231

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On Case by Bill Defendant pleaded a wrong Addition; *Respondens ouster*, for Statute of Additions extends only to Process on which there is Outlawry, and that is not on Suit by Bill. 211

A Mathematical Master is a Gentleman by his Profession. 249

Administrations, &c.

Bankruptcy of an Executor no Cause for granting Administration; *aliter* if there be a natural Disability. 9

May be granted to the Wife, or next a-kin to the Intestate, at the Election of the Ordinary; and as to Creditors, the Ordinary may divide the Administration among them. 16

Administration pleaded to be granted by *A. istius loci ordinarius legitime constitutus cui administratio de jure pertinet*, good, without say-

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saying <i>tunc & quomodo Constituitur</i>. Page 100 Bill of Exchange is no more than a simple Contract, and therefore Assets only where the Debtor is, and Administration to be accordingly. 107 Administration granted during the Minority of an Executor ceases at his Age of seventeen; but granted during the Minority of one who is intitled to Administration, does not cease till the Age of twenty-one. 194 Spiritual Court cannot refuse granting <i>Probate</i> of a Writ to an Executor because indigent or insolvent, nor compel him to give Security. 205 If Feme Covert, being Executrix and Legatee, dies, Administration <i>de bonis non</i> ought to be committed to the Husband; if she be no Legatee, and others are, it ought to be to them; if there are no Legatees, to the next of Kin of the first Testator. 306 If a Person who has two Houses in different Dioceses dies in one, that intitles the Ordinary to grant Administration, if he has not <i>bona notabilia</i>. 385 Where there is Executor under Age, if there be residuary Legatee, Administration <i>durante Minoritate</i> ought to be committed to him, and not to the next a-kin of the Intestate. 437, 438 Where Directions of the Statute are pursued, Administration cannot be repealed; <i>aliter</i> where not. 437 Administration committed to one <i>durante Minoritate</i> of an Ex-	ecutor, whether on his dying under Age it may be repealed, and granted to the Residuary Legatee, or whether the Ordinary has not executed his Authority? Page 436 Debt as Administrator, not saying by whom committed, cured by pleading in chief. 443 Administration <i>durante Minoritate</i> of Executor determines at seventeen, of one intitled to Administration at twenty-one. 500 Debt by Administrator, <i>cui Administratio debito modo commissum fuit</i>, is ill on Demurrer, but cured by pleading over. 537 Administration to be granted to the Grandmother preferable to the Niece. 615 Proximity of Degrees must be according to the Common Law. 616 If Administration be granted to a wrong Person by a rightful Jurisdiction, must be avoided by Appeal. <i>Ibid.</i> If granted by one who has no Jurisdiction is void, and Trover will lie. 617 Husband to have Administration to Wife. 618 Wife and Father in equal Degree as to Administration. <i>Ibid.</i> Residuary Legatee preferable to next of Kin. 619 Aunt not nearer than Grandmother, who being in the right Line is to be prefer'd. <i>Ibid.</i> Administration is to be committed to Father and Mother preferable to Brother and Sister. 622 Brother and Sister nearer than Grandmother, and Aunt nearer than Great-Grandmother. 623 Adminis
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Where there is a Capture of Goods at Sea, the Admiralty has Jurisdiction; if brought to Land, either Admiral or Common Law, at the Plaintiff's Election. *Page*

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Prohibition may go to the Admiralty at any Time, if on the Proceedings it appears have not Jurisdiction. 134, 135

By the Admiral Rule, Property of a Ship taken from an Enemy without Letters of Mart, vests in the King; and tho' such Ship be after sold on Land, Suit be for it in the Admiralty, for it shall be construed one continued Act. 135

A Capture without a Condemnation does not alter the Property. 143

Libel did not shew the Capture was *super altum mare*, tho' the subsequent Proceedings did. Court divided whether Prohibition should go. *Ibid.*

Prohibition denied to go to the Admiralty, on Refusal to give Copy of the Libel; for 2 H. 5. c. 3. extends only to Ecclesiastical Courts. 244

If Ship arrested by the Admiralty Process within their Jurisdiction be rescued, may re-seize any where. 246

The Cause to bring it within their Jurisdiction should appear in their Process. *Ibid.*

Grant to the Admiral of all Wrecks at Sea, and all Profits to the said Office belonging, will

not pass Wreck appurtenant to a Manor then in the King's Hands.

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Suit may be in the Admiralty for Seamen's Wages, but not for the Master's. 405

For Money taken up for the Use of the Ship after has begun Voyage, suable in Admiralty; *aliter* if Money was taken up before Voyage begun. 406

If Ship be taken or lost in Return, shall have all Wages out, but only Half of Wages for Time were in Harbour abroad. 408, 409

Mate of a Ship may sue in Admiralty for Wages. 440

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Master of a Ship may detain the Goods for Freight; but if he once parts with them, he cannot retake them. 511

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A House of Boarders and Lodgers for themselves and Horses, not an Ale-House; nor can Soldiers be billeted on them as such. 254, 255

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	The Record not being put in on Appeal, to be tried at <i>Nisi prius</i> ; neither Nonsuit nor Discontinuance, only Appellant to pay Costs. Appearance of Appellant's Attorney sufficient, being in Case of a Feme. 65 8 P Ap.

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A Person found guilty of Manslaughter may be appealed the same Sessions; but if not ready the Appeal will be gone. 157

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Infant need not have Guardian to sue the Writ, but to prosecute it. 374, 375

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Benefit of Clergy and burning in the Hand is no Judgment. *Ibid.*

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First Process in Inferior Court was a *Capias*; it is but a Misconveyance of Process, and helped by Appearance. 47

Filing a Writ of *Habeas Corpus* is no Appearance, but *Procedendo* may go notwithstanding. 215

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Conviction for using a Trade one Month, on Indictment for using it three Months, may be pleaded in Bar, *absque hoc*, that he was guilty in any other Month. 561

Apprentices. Vide Order of Justices of Peace.

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Submission of both Parties is a mutual Promise, whereon *Indebitatus Assumpsit* will lie; and Award without Performance is a good Bar. 4

Award for a general Release to the Time of the Award; a Release to the Time of the Submission is good. 8

Award of all Matters to the Time of the Award, good; for shall be intended no new Matter arose between the Time of the Submission and the Award; and if it should award for Matters since the Submission, it would as to them be void; and a Release of all Matters to the Time of Submission, would be a good Performance of such Award. 116, 117

Award by Umpire before the Arbitrator's Time is expired, is void. *Page* 120

If Arbitrators choose Umpire conditionally that he accept it, if he refuse, may choose again; *aliter* if no Condition be annexed, for have executed their Authority. *Ibid.*

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Where a particular Thing is to be done on one Side, as a Condition for doing several others on

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If a Corporation be made to a particular Purpose, and they devote themselves of all Right, so that the End of the Institution fails; the Corporation is dissolved. *Ibid.*

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Exception of a Passage in a Lease, being not Part of the Thing demised, but *dehors*, will amount to a Reservation, and Covenant will lie.

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On the 23d of *Eliz.* for not coming to Church, it is no Plea, that he was excommunicate, being his own Default.

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Process for Excommunication may be served on *Sunday*, notwithstanding 29 *Car. 2.*

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The Writ of *Excommunicato Capiendo* need not specify the

Cause specially, but should appear on the *Sgnificavit.* Page

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The Cause of Excommunication ought to be certainly set forth.

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Before the Statute, if the Cause returned was insufficient, should go into Chancery for a *Superfedeas*; but that cannot be done now, the Writ is returnable in *B. R.* where if it be wrong, it must be quash'd.

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Excommunication pleaded in Abatement must only be *quousque*; for on Absolution shall have Resummons.

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11

Pleading six Judgments confesses Assets for above five; and in Replication should not conclude to the Country, but *hoc parat' est verificare.*

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Tho' a Statute be of higher Nature, it is no *Devastavit* to pay

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| <p>a Bond before it, because not due till broke. Page 291</p> <p>Suit may be against one both as Heir and Executor; <i>per Holt.</i> 328</p> <p>If Executor suffers Judgment to go against him by Default, it is an Admission of Assets; and the Sheriff may on the <i>Fieri facias</i> return a <i>Devastavit.</i> 411</p> <p>Reason why Executor on Nonfuit is not to pay Costs, is his being supposed ignorant. 440</p> <p>If Rightful Executor brings Trespass against <i>tort</i> Executor, he may give Evidence of Payment of rightful Debts in Mitigation of Damages; yet the Right of Action and Verdict shall be against him. 441</p> <p>If <i>tort</i> Executor pays Debts with the Goods, the rightful Executor shall not avoid the Payment, tho' may maintain Trover against the <i>tort</i> Executor; but shall only recover in Damages what he has misapplied. 471</p> <p>Executor must plead all the Judgments in Force against him, else shall never have Advantage of them. 496</p> <p>If Executor pleads a Judgment generally, he confesses Assets for so much, and cannot after say he has Assets to a less Value. 527</p> <p>If Executor pleads Judgment ill, or it be found, on Issue join'd, kept on Foot by Fraud, he has confess'd Assets for it. <i>Ibid.</i></p> <p>If on Judgments pleaded Plaintiff prays Judgment when Assets come, he shall not be chargeable till those are paid, tho' had not</p> | <p>Money to do it at Time of Plea. Page 528</p> <p>If Issue is taken on the Fraud which is found, but not found to have Assets for the whole Sum, it shall not be intended there was more than confess'd. <i>Ibid.</i></p> <p><i>Per Holt</i>: It seems if Executor does not bring Action within six Years, it will be <i>Devastavit.</i> 573</p> <p>If Intestate dies within six Years after Action brought, and Executor has Time within six Years, and does not pursue it, Statute will incur. <i>Ibid.</i></p> <p>In pleading want of Assets, the Time must be set forth. 611</p> <p>If Executor pleads a Recognizance, he must set it forth; but of a Judgment need only say in such a Court of <i>Westminster</i> it was had against him; but if in Inferior Court, must give it Jurisdiction, and say <i>taliter processum fuit.</i> 613</p> <p>Covenant to serve <i>A.</i> and his Assigns for eight Years; Executor may bring Covenant, averring he used the same Trade. 650</p> <p>Execution. Vide Recognizance.</p> <p>Death of one of the Plaintiffs in Error must be suggested on the Roll before Execution can be taken out. 130</p> <p>The first <i>Fieri facias</i> delivered to the Sheriff should be first executed; but if he executes one delivered afterwards first, the Execution is good, and the Party must have his Remedy against the Sheriff. 146</p> |
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Convocation, with Consent of the King, may make Canons to bind the Clergy; and the Disobedience of them is Cause of Deprivation. *Page 238*

And if also made a temporal Offence, may proceed to Deprivation, tho' not punish him as for a temporal Offence. *239*

By the Law of *England* before the Conquest, all Children equally succeeded to real and personal Estate. *623*

In *Henry I.*'s Time Daughters were excluded as to Land. *Ibid.*

But if were no Children, went to Father or Mother; but between the Reigns of *H. 1. & H. 2.* Father and Mother were excluded, and Collaterals let in. *624*

But no Alteration ever made in respect of personal Estate. *Ibid.*

Law Cases denied.

Telverton 158. denied. *47*

1 Cro. 64. Sutton's Case, denied. *Ibid.*

1 Sid. 400. 1 Vent. 8. denied. *223*

2 Inst. 491. That Pension cannot be sued for in Spiritual Court; denied. *416*

2 Rol. Ab. 462. p. 3. denied. *424*

Hob. 81. held *contra.* *539*

Hetley 8. denied. *597*

1 Sid. 376. per Holt, denied. *652*

Leases.

Covenant and Entry amounts to a Lease. *Page 1*

Lease at Will may be determined by either Party, by Loss of accruing Rent. *610*

Lease for a Year, and so on from Year to Year, is a Lease for a Year, and for another Year, as soon as it is held under. *Ibid.*

A Lease for three Years, to commence *in futuro*, by Parol, is void by the Statute of Frauds. *Ibid.*

Libellus famosus.

Writing a Libel is making a Libel, *juxta tenorem sequentem* imports the very Words themselves. *218*

Liberties. Vide *Franchises*.

Limitations and Statute.

Promise made after the Statute had incur'd, that if would prove the Delivery of the Goods he would pay; this conditional Promise takes it out of the Statute. *223,*

224

The bare Acknowledgment of a Debt does not amount to a new Promise, but is good Evidence. *224*

Statute of Limitations no good Plea to *Indebitatus Assumpsit*, on Promise to pay on Demand. *444*

Whether an Original sued out in *Dorsetshire*, above six Years, and Case thereon in *London*, within six Years, will prevent the Statute. *568*

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Actual

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Actual Entry must be to prevent the Statute. <i>Page 573</i>	But Feoffment by him is only voidable on Account of the Notoriety of it. <i>Page 173</i>
If Intestate dies within six Years, so as Administrator had Time to bring the Action within six Years, and does not, Statute will incur. <i>Ibid.</i>	Ideot cannot gain a Settlement. 322, 323
Not pleadable to a Current Account. 579	Mathem. Vide Trespas.
London and its Customs. Vide By-Laws, Corporation.	Mandamus. Vide Corporation.
In Action of Debt brought in <i>London</i> , if the Goods of the Defendant are attached in the Hands of a third Person, but not removed; on the Cause being removed into <i>B. R.</i> by <i>Certiorari</i> , the Goods shall not then be delivered to the Plaintiff. 213	N <i>ON fuit debite electus</i> a good Return, being a direct Answer to the Writ, which recites <i>licet fuit debite electus.</i> 2, 3
In <i>London</i> no Exceptions are taken to Bail, but there is an Officer to take it; which if insufficient, he must pay the Debt, or the Profits of his Office will be sequestred. 249	Return to a <i>Mandamus</i> to restore <i>A.</i> to his Place of Alderman was, that he had removed out of the City; and <i>licet</i> being summoned to attend, he did not, held good Return <i>per</i> three Judges against <i>Holt</i> , who held a particular Summons was necessary to shew why he should not be disfranchised; for he might have good reason of Absence, as Sickness, which by this Way he would be deprived of shewing. 27, 28
<i>Hustings</i> is the County Court in <i>London.</i> 320	If a Crime, for which a Person is removed, is not well set forth in the Return, peremptory <i>Mandamus</i> shall go. 113
Officer may take some reasonable Part of Defendant's Goods to compel Appearance; and on Attachment of Goods, the Custom is to leave them in Party's Hands till the Matter be determined. 326	Return to a <i>Mandamus</i> good, tho' there be neither the Hand of the Mayor, or Seal of the Corporation to it. 126
Custom of foreign Attachment must be specially shewn. 407	If a Return be false, Action lies against the Body Politick, and against a particular Person, for procuring a false Return. <i>Ibid.</i>
The very Record is never removed from <i>London.</i> 454	<i>Mandamus</i> to admit a Person to his Freedom, having served seven Years Apprenticeship. 190
Lunatick and Ideot.	<i>Man-</i>
Surrender by Lunatick is absolutely void. 173	

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Mandamus must be delivered to him who is to make the Return.

Page 251

Return ought to be by the Mayor, with the Consent of the major Part of the Corporation; and if he does it, not having such Consent, Information will lie against him, for false Return.

308

In Case for a false Return to a *Mandamus*, need not alledge that they ought to obey it; for by making a Return that is admitted.

322

Cannot sue out a joint *Mandamus*, for the Wrong done to one is not so to another.

332

Two cannot bring Action for false Return to *Mandamus*.

349

Return to *Mandamus* requires the greatest Certainty, because it cannot be helped by pleading.

401

Where a new Jurisdiction is created by Act of Parliament, *B. R.* may command the Execution of it by *Mandamus*.

403

Action for false Return is local, but may be laid either where the Return was, or where it is of Record.

408

If Person be irregularly chose, and after is regularly entred in the Books, or elected to a superior Dignity, Evidence of an Election not to be controverted; *per Holt.*

Ibid.

If Officer makes an ill Return, he shall be amerced; if makes a second ill, Attachment shall go.

410

It is a good Return to a *Mandamus* to swear a Person in a Common-Council Man, that he had not

taken the Oaths pursuant to 23 Car. 2.

Page 601

No *Mandamus* to swear in a Register, but should have Affize.

609

Mandamus to swear in a Steward of a Copyhold Manor refused.

666

Manor. Vide Copyhold.

Markets. Vide Fairs.

Marriages. Vide Baron and Feme.

Mariners. Vide Admiralty.

Marshal and Marshalsea.

A Steward of the Prison was put in by one who had only an Estate for Life in the Office of Marshal; the Marshal was for Misdemeanor removed by Act of Parliament; whether he be removable by the succeeding Marshal, *Quare.*

557

Held *per Holt*, that such an Officer put in for Life was not removable by a succeeding Marshal on the Surrender of the Estate of the Marshal for Life, because he could do nothing to defeat his own Grant; and that a Removal by Act of Parliament for his own Offence, was his own Act.

557, 558

But as the succeeding Marshal is answerable for his Prisoners, whether one can be imposed upon him was the Doubt.

558

If one by Process of *B. R.* is turned over to the Marshal, and by *Habeas Corpus* is turned over to the

the

The TABLE.

the Fleet; *per Holt*, that shall not hinder declaring against him *in Custodia.* Page 560

Tipstaff is Marshal's Officer, and Commitment to him is to the Marshal. 634, 635

Master and Servant. Vide Notice.

When a Person is made Master of a Ship, he has the appointing of the Crew; for as he is answerable for all Events, he should have the Election of those he can confide in. 434

Servant or Deputy not chargeable as such for Neglect, only for Misfeasance; but Recourse to be to the Principal. 488

Lieutenant of a Man of War may give moderate Correction, but not wound. 504

If a Servant usually employed to borrow Money, or pawn Goods for the Master, does it, Debt will lie against the Master. 564

Maxim.

Qualibet narratio super breve debet Locari in Comitatu in quo breve emanavit. 568

Melius inquirendum. Vide Coroner.

Merchants, Merchandize and Factor. Vide Bills of Exchange, Master.

Ley merchant is *jus gentium*, and Part of the Common Law; and the Court ought to take Notice of it when pleaded. 15, 16

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By Bill of Lading the Property is consign'd over, and he may bring Action; and the Envoyes signify nothing. Page 156

The Captain of a Ship insured may be changed without Notice to the Insurers. 325

Joint Traders are jointly charged, if there be no special Agreement. 446

Factor of Common Right is to sell for ready Money, unless the Usage be in such particular Goods to sell for Credit. 514, 515

If there be no such Usage, and Sale is on Trust, the Factor is only liable, and such Sale is a Conversion in him; and if the Sale be not in Market Overt, no Property is thereby altered. 515

The Remedy against a Factor is Account, but if he converts Goods, Trover will lie. 602

Misfeasance, &c. Vide Actions on the Case.

Misnomer. Vide Abatement, Addition, Names and Variance.

Modus Decimandi. Vide Cythes.

Money.

Where foreign Coin is demanded, the Action is in the *Detinet*; and the Averment that the Defendant has neither rendred it, nor the Value. 81

Money allow'd to be brought into Court in *Assumpsit*, because Payment goes to the Issue; but in Trover

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- Trover it goes only to the Damages, and not allow'd to be brought into Court. *Page 90*
- Covenant on three distinct Covenants, one of which was for Non-payment of Rent, refused to let Money be brought into Court; for when Plaintiff has just Cause of Action, will not oblige him to go to Trial for the Residue, on Peril of Costs. *95*
- Guineas are coin'd at the Mint for twenty Shillings, and at that Rate are lawful Money without Proclamation. *100*
- Money may be brought into Court on *Assumpsit*, but not on a *Quantum meruit*. *187*
- See how Money came to be brought into Court. *153*
- Money not to be brought into Court on Covenant. *241*
- In Debt on a Bond for foreign Money, declares for so much *English* Value. *541*
- If Action be brought for foreign Money, it is Detinue. *Ibid.*
- When Suit is on a Counterbond, or where there is a Pretence of a collateral Agreement, Principal and Interest not allow'd to be brought into Court. *598*
- Money not to be brought in on *Quantum meruit*; but the Way is to confess the imploying, and that he deserved but so much; and plead a Tender, to which Plaintiff may reply, *he deserved more*, and so come to Issue. *614*
- If a *Quantum meruit* and *Indebitatus* be in the same Declaration, Money may be brought in on the *Indebitatus*, which will affect the other. *Ibid.*
- On bringing Money into Court, the Course is to pay Costs so far, if Plaintiff will take it out; but if it be such an Action that Defendant may plead Tender in Bar of Costs, and that Plaintiff to oust him of that, would reply a special *Capias* of a precedent Term: All this may be settled on Motion. *Page 633*
- Motion. Vide Money.**
- Act made on disbanding the Army, that Soldiers should be free from Suits for three Years. A Soldier cannot be discharged on Motion, but must plead the Act. *336*
- Scire facias* on wrong Judgment set aside on Motion. *351, 393*
- A Custom-house Officer was indicted for Forgery, Court will not make a Rule to produce the Custom-house Books. *583*
- Murder. Vide Appeal, Indictment.**
- Where Persons are doing an unlawful Act, and Murder ensues; it is Murder in all, and it is lawful for any one to command the King's Peace and suppress them; and such Attempt to suppress them, is not such a Provocation to make Killing Manslaughter. *256*
- Persons quarrelled on a sudden, and for Conveniency went out of the Park to fight; if Death ensue on this sudden Quarrel, it is not Murder. *304, 305*
- Several Persons being met to do an unlawful Act, one fires a Gun and kills one of his own Party, it is

The TABLE.

not Murder ; not being found
he shot at the King's Officers,
who opposed. *Page 627*

If it had, had been Murder, tho'
killed one of his own Party.

Ibid.

If one shoots, intending to kill
one, and kills another, it is
Murder. *628*

In general, if two are engaged in
an unlawful Act, and a Man is
killed, all are guilty of Murder.

629

But if he knew not of the particular
malitious Design, which was dis-
tinct from what engaged in, it
is not Murder. *Ibid.*

The Act of one, whereby Murder
follows, must be in Pursuance of
the original unlawful Design. *630*

If in a Fray a Constable, not
known to be such, is killed; it
is not Murder. *631*

If a Person in such a Fray de-
clares he comes to keep the
Peace, is killed, it is the same
as if he was known to be a Con-
stable, having equal Power for
that Purpose; and is Murder.

Ibid.

But in a Riot, if any Person be
killed in Pursuance thereof, all
concerned are guilty of Murder.

Ibid.

The deliberate Act ought to be to
the Hurt of some body. *632*

Or if not against a Person, yet
must be a felonious Act, or car-
ried on with a felonious Intent;
it is Murder, else not. *Ibid.*

5

Names of Purchase and Dig- nity.

GRant to a Man by the Name
of Knight, who was only an
Esquire, is void. *Page 185*

De creat Regnum. Vide Writs.

Nisi prius.

Ejectment against seven, who all
appear, plead and join Issue on the
Plea Roll; the *Jurat* and *Dis-
stringas* were against seven; the
Issue on the *Nisi prius* Roll was
joined only by five, and Verdict
against seven: The *Nisi prius*
Roll is amendable, for the Judge
had sufficient Authority to try
the Cause. *107*

The Reason why the *Nisi prius* is
on the *Disstringas* is, that the
Jury may be returned above,
and the Parties know them. *370*

On Information, not guilty pleaded,
the Defendant at *Nisi prius* con-
fessed the Action; either no No-
tice should be taken of the *Nisi
prius*, or should shew the Jury
were called. *377*

Cognovit actionem may be entred
there. *653*

Pleas *Puis darrein Continuance*
may be recorded there. *Ibid.*

Day in Bank and *Nisi prius*, as to
pleading, are the same. *654*

Nobility. Vide Peers.

Nolle prosequi. Vide Non suit.

Non compos. Vide Lunatick.

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Nonfuit, Non prof. Retraxit.

Nonfuit not to be set aside without Consent. Page 127

Nonfuit may lie in Term-Time. 417

Prosecutor entred a *Non prof.* of Indictment of Perjury, and that set aside. 647, 648

Judge of *Nisi prius* may enter a *Retraxit* against one, and proceed to Trial against the others in Ejectment. 651

Retraxit is only an Agreement not to proceed; and is not a Confession of having no Cause of Action. 653

Non prof. does not amount to a Release. 654

Notice.

Must be personal Notice before Attachment will go for not performing an Award. 257

If Servant, who had Power to draw Bills of Exchange in his Master's Name, draws Bills after he was out of his Service; if it be so short a Time after, as the World could not take Notice of it, it shall bind the Master. 346

When Exception is taken to Bail, Notice should be given to Defendant's Attorney. 435

Should be Notice of Motion to make Submission to award a Rule of Court. 525

Nusance.

Indictment of Nusance for keeping Gun-Powder. 342

There must be apparent Danger; and tho' had been done so for many Years, if it be a Nusance it will not make it lawful. Page 342

If at the Time of setting up the House in which the Gun-Powder was kept, no House were near, but after others built, it is at Peril of Builder. Ibid.

A Thing that will be a Nusance, when compleated, yet cannot be abated till it be actually so. 510

If the Owner of a River neglects to scower it, by which Land is overflown, he is indictable. Ibid.

Gift of the Action in Nusance is the Damage, and therefore Evidence may be given of consequential Damages; not so in Trespass, which is one entire Act; *per Holt.* 519

On Information for Nusance, Evidence being doubtful, Jury to have View by Consent. 626

Tenant for Years erects Nusance, for which Damages are recovered, he assigns the Term; the Nusance is continued, Action may be brought either against him or his Assignee. 635

But shall be only one Satisfaction, *per Holt.* 640

Before *West. 2. c. 24.* lay not against the Erector after Assignment. 637

Quod permittat lies only against the Tenant of the Freehold. 639

Erector is liable for all consequential Damages, which he cannot purge by Assignment over. Ibid.

Action lies for the Continuance of it. Ibid.

Per Holt: Whether it be Waste in Alience to abate a Nusance. 640

Dathys

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Oaths and Affidavit.

ON Admission to Freedom, Quaker's solemn Affirmation sufficient. Page 190

Quaker on demanding Surety of the Peace, must take the usual Oath. 243

After Affidavits filed, and Day given for hearing Counsel; none shall be read which contain new Matter. 326

Obligation.

Bond is no Satisfaction for Money due, tho' it may be for Money before it is due. 86

Tho' a Bond be in Words ever so improper, if the Intent of the Parties can be collected, it shall be good. 193

Judgment a good Plea in Satisfaction of a Bond. 248

Bond to sue with Effect, is not forfeit by suing Injunction. 320, 380, 381

Bond for Performance of Covenants, Plea, that for the Breaches he had recovered Damages in Covenant, no Plea in Bar, for shews the Bond was forfeit. 321

Obligation to do an impossible Thing, is single. 418

Bond for forty *Liberis* good. 495

Bond discharges *Assumpsit* by Extinguishment, being of a higher Nature. 537, 538

On Debt on a Bond, Plea that Plaintiff agreed to accept a Bond in Satisfaction of the first Bond, it is ill; for it is no more than a Covenant, and not a Release. 539

Bond may be Satisfaction of the Condition of another Bond before forfeited; *aliter* if after. Page 539

Occupant and Occupancy.

Estate *pur antea vie* only Affets in respect of Creditors, and not chargeable with Legacies, unless thereout expressly given; and the Executor or Administrator, if no Debts appear, will be Occupant, and is not distributable. 103

Office and Officers. Vide Justification.

Register's Office of *Landaff* may be granted to two; and a judicial Office may as well be granted to two, as a ministerial. 10

Clerk of the Peace not removable but on Misdemeanor, for has a Freehold; and Articles in Writing must be exhibited against him. 13

The Custody of the Rolls belongs to the *Custos Rotulorum*; the making them up belongs to the Clerk of the Peace, who is a distinct Officer, and not a Servant to the *Custos Rotulorum*. *Ibid.*

Clerk of the Peace not removable by a new *Custos Rotulorum*, for has a Freehold in his Office. 42

Bond given by Deputy to be accountable for Half the Profits of an Office, not being within 5 *Ed.* 6. this Bond is good, not being for a Sum certain. 90

Custos Rotulorum may appoint Clerk of the Peace by Parol. 199

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Parish Clerk cannot sue for a Salary in Spiritual Court. *Page* 583

Orders of Justices of the Peace. Vide Poor. Apprentice.

Order of Sessions on Appeal is final, tho' the Statute does not expressly say so; and the Court of King's Bench cannot examine the Fact, but only quash the Order, if contrary to Law, on the Face of it. 20

Two Justices of the Peace removed a Poor Man from *H.* to *B.* which the Sessions reciting, and that he had rented a Farm of ten Pounds *per Annum* at *H.* ordered that he should be settled at *H.* resolved that the Settlement at *H.* being the Place from whence he was removed, is a Reversal of the first Order, *per* two Justices *contra Holt*; who held it should have appeared he had been settled there forty Days. *Ibid.*

It is not necessary to say he rented a House of ten Pounds *per Annum*; the Order must be on Complaint of the Overseers and Churchwardens, else the Justices have no Jurisdiction. 89

Order made by Justices, who are not said to be of the Division, good; for the Statute is only directory. 138

Appeal from Order of Justices must be to the next General Sessions, and not to the next General Quarter-Sessions. 203

Order of Sessions quash'd, being likely to become chargeable, as we are credibly informed. 323

Order made conditional if *B. R.* be of such Opinion, quash'd. *Page* 323

Sessions can only affirm or quash Orders on Appeal; and have no Power to make an Order. 376

B. R. ex debito justitie, is bound to confirm Order, if nothing appears why it should be set aside. *Ibid.*

In Order of Justices in Adjudication of the reputed Father of a Bastard Child, must appear that one of them was of the *Quorum*, and that the Examination was by two. 393

Order to remove a Man and his Family ill; so of him and his Children. 398

When two Justices make an Order, they may certify it to the Sessions; and then the Sessions are legally possessed of it, and removeable by *Certiorari*. 402, 403

Servant hired for a Year shall not be removed for being got with Child. 403

Both Justices in making Order must examine. *Ibid.*

Order of Sessions for assessing towards Repair of a Bridge, removed by *Certiorari*. *Ibid.*

Justices cannot order a Sum of Money to be paid for drawing Indentures of Apprenticeship, but should order a Rate to levy so much *per Week*, till convenient Sum be raised. 417

Order confirmed on Appeal is conclusive. 419

Sessions may originally make Order for discharging Apprentice; and may order Master to refund Part of

The TABLE.

of the Money; it must appear that Master was summoned. <i>Page 498, 553</i>	The Cattle of a Stranger <i>levant</i> and <i>couchant</i> on Land extended on an Outlawry, may be taken by a <i>Lecari facias</i> . <i>Page 175</i>
If Order of Justices be quash'd in <i>B. R.</i> the Order of Sessions falls. <i>548</i>	If an outlaw'd Person, before Inquisition, aliens, it prevents the King's Pernancy of the Profits; <i>aliter</i> if the Alienation be after Inquisition. <i>176</i>
If Order of Justices be confirm'd on Appeal, the Appellants are concluded. <i>Ibid.</i>	King is not intitled to real Estate, or Chattels real, without Office; but to Chattels personal he is. <i>177</i>
Five Justices should not join in an Order of Sessions; <i>per Holt. 559</i>	Not saying <i>pro com</i> , an Exception. <i>337</i>
Sessions quash'd an Order of Justices, and before the poor Person comes back, Justices make a new Order; it is ill. <i>633</i>	When Cause of Action accrues at a Time a Person is outlaw'd, Plea of Outlawry overthrows the Writ, and after Removal of Outlawry must begin <i>de novo</i> ; but where the Disability comes after the Cause of Action accrued, the Plea of Outlawry is only a temporary Disability, and does not abate the Writ, but only <i>quousf-que</i> . <i>400</i>
To remove a Person, must be Adjudication, is likely to become chargeable. <i>667</i>	If a Person who is visible, is outlaw'd, the Outlawry shall be reversed at the Charge of the Plaintiff. <i>413</i>
Order to remove Wife and Children to the last Settlement of the Husband, ill; for Children might have another Settlement. <i>Ibid.</i>	<i>Per Holt</i> : By Outlawry a Lease for Years is forfeit before Seizure; and if sold before Seizure, the King shall avoid the Sale. <i>438</i>
Order confirm'd on Appeal is final to that Parish; so if it be not appealed from. <i>668</i>	Feme Covert outlaw'd without Baron, discharged on Motion. <i>444, 445</i>
Ordinary. Vide Administration.	Outlawry of Treason reversed, not saying where the Court was held. <i>542, 544</i>
Donative is exempt from the Ordinary's Jurisdiction; yet the Clerk of it may be punished by Ecclesiastical Censures, but not to Deprivation. <i>640, 641</i>	Before Outlawry for Murder be reversed, a <i>Scire facias</i> must go to all the Lords mediate and immediate; or Attorney General must confess on Record that there
Orphans. Vide London.	
Outlawry. Vide Issues.	
Persons outlaw'd for Felony, Court cannot give Judgment against them, unless are present; it being for a Corporal Punishment. <i>156</i>	

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there are no Lands or Tenements.

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In Error to reverse Outlawry for Matter of Law, need not give Bail to the original Action, as must for Want of Proclamations.

545

Special Bail to reverse Outlawry, is to answer Condemnation; other special Bail is, or to render Body to Prison.

545, 546

Overseers. Vide **Poor.**

Palatine Counties.

THE Stile of the Justices in *Durham* is always Itinerant; and there there is no great Sessions.

181

If Person be in Custody of Marshal for Cause, he may be proceeded against for Matter arising within County Palatine.

535

Parceners. Vide **Jointenants**, &c.

Pardon.

Where a Crime is pardoned, all the Consequences thereof are discharged.

119

If the King grants away his Fines, that does not extinguish his Power of pardoning; for that is inseparably annexed to him. *Ibid.*

Parish, Town, Vill.

Parish may tax themselves to carry on a Suit for the Good of the Parish; but in such Rate the

Majority will not bind the rest, as in Case of other Rates. *Page*

440

A Chapel's having Sacramentals only, will not make it independent of the Parish.

504

Vill and Village are the same; a Hamlet is a Division of a Vill; the whole Vill is a Constabulary.

546

Parish Clerk. Vide **Officer.**

Parliament. Vide **Privilege.**

If Member of Parliament sue one at Law, he may be brought into Equity without Breach of Privilege.

343

Writ of Error *ad prox. Sessionem Parliamenti*, and before that Time it be dissolved, and Day fixed for a new one; whether it be a *Superfedeas* of Execution.

604

If Proceedings be on Impeachment, and then the Parliament be dissolved, may proceed in an other Parliament.

605

If Term intervenes between a Prorogation, Execution may be, by the Opinion of *Hale* and *Keeling*.

Ibid.

If Writ of Error be left in the Lords, and there be a Dissolution, Execution may be taken out; but the Writ of Error is not discontinued.

Ibid.

Parson, Vicar and Curate.

The Freehold of the Church is in the Parson, and no one can preach in it without his Leave.

433

None

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None can preach without License of the Ordinary, which he ought to grant *ex debito justitiæ* to one who is fit; but if will not do it, the Remedy is Appeal, not *Mandamus*. Page 433

Pawns. Vide **Pledges.**

Peace Surety of. Vide **Good Behaviour.**

Peers of the Realm.

Indictment for Murder by the Name of *C. K.* pleads in Abatement *Misnomer*, and that he was Earl of *Banbury*; and held good Plea.

In Civil Actions the Recognizance is entred into by the Bail only; and so no Estoppel to a Defendant's Peerage. 217, 218

Perjury.

Where a Thing is expressed with Certainty before, an *Innuendo* may relate to it, and explain it; else not. 139

In swearing off a Contempt, may be Perjury. 511

Pleas and Pleading.

Where a Thing may be pleaded in Abatement, that shall not be assign'd for Error. 1

Jointenancy must be pleaded in Abatement, and cannot be pleaded in Bar 3

Touts temps prist cannot be pleaded after Imparlance; but on a

5

Bond after Imparlance, Tender may be pleaded, and *uncore prist*.

Page 8

Hoc parat' est verificare only Form.

38

Plea in Bar, that he was Administrator, and not Executor, ill.

46

Writ of Error depending in Exchequer Chamber, no Plea in Debt on a Judgment. 48

Plea, that the Indorsee was a Bankrupt at the Time of Indorsement, good Plea; but must plead that a Commission was taken out. 50

Plea, that he was Administrator, and not Executor, *unde petit judicium quod, &c. non respondere debeat*; this would have been a good Plea in Abatement if properly concluded, which should have been *quod Billa cassetur*; not being so, it is ill. 83

If a Thing be to be done by a Man, or his Assigns, must shew it in the Disjunctive; but if to a Man and his Assigns, need not mention his Assigns; he must shew he has assign'd it over. 86

Another Action, pending for the same Cause, may be pleaded *prout patet per recordum* before the Original fil'd, or Issue entred on Record. 91

In all Cases where a Person admits the Action, were it not for some special Matter, that may either be specially pleaded, or given in Evidence. 97

In special Pleading, wherever the Defendant sheweth a Cause of Action in the Plaintiff, either express or implied, and confesseth and avoideth it, it is a good Plea; but without allowing a Cause

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